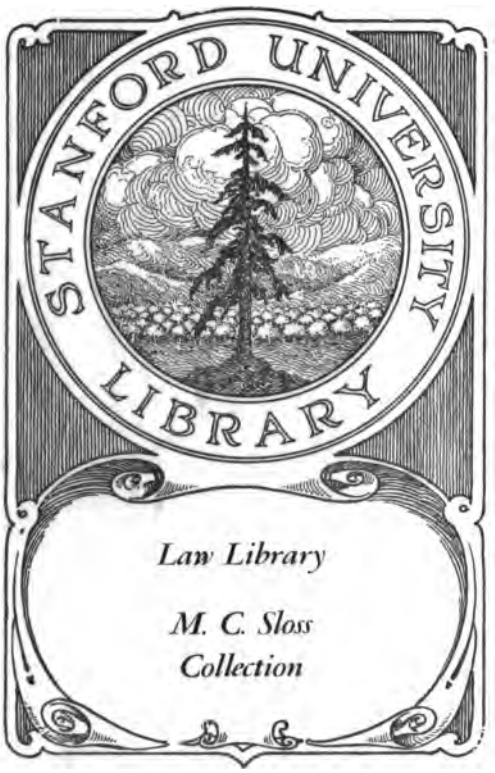
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THE SOUTH AUSTRALIAN LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF SOUTH AUSTRALIA.

EDITED BY

H. F. DOWNER,

A PRACTITIONER OF THE SUPREME COURT.

VOL. XV.—1881.

ADELAIDE:
W. K. THOMAS & CO., PRINTERS,
GRENFELL STREET.
1884.

W. K. THOMAS & CO., PRINTERS, GRENFELL STREET, ADELAIDE.

JUDGES OF THE SUPREME COURT.

1881.

THE HONORABLE SAMUEL JAMES WAY . . . . . CHIEF JUSTICE.

THE HONORABLE JAMES PENN BOUCAUT . . . . . SECOND JUDGE.

THE HONORABLE RICHARD BULLOCK ANDREWS . . . THIRD JUDGE.

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THE

SOUTH AUSTRALIAN LAW REPORTS.

1881.

BOUCAUT, J.] [COMMON LAW.

5 FEBRUARY, 1881.

IN THE MATTER OF THE GLENELG AND SOUTH COAST TRAMWAY COMPANY, LIMITED.

GARNISHEE ORDER.—Company—Liquidation—Lien—Insolvency Act, 1860*—Supreme Court Act,* 1878.

A garnishee order does not rest in the creditor any property in the moneys attached, nor any lien thereon within the meaning of Section 160 *of the Insolvent Act,* 1860*; and the effect of Section* 6*, Sub-section* 1 *of the Supreme Court Act of* 1878 *is to place a company in liquidation in the same position as an insolvent, so as to vest in the trustee in insolvency any moneys of the company in respect of which, at the time of the winding-up, an attachment has been obtained by a creditor of the company.*

THIS was an application by Messrs. Harris, Scarfe, & Co. to set aside an injunction obtained by the Scandia Company, of Copenhagen, restraining Messrs. Harris, Scarfe, & Co. from attaching in the hands of Messrs. Kingston & Kingston, solicitors for the Glenelg and South Coast Railway Company (Limited), the sum of £1,100 held by them on behalf of the last-mentioned Company to answer a debt due by such Company to Messrs. Harris, Scarfe, & Co.

The garnishee order had been obtained and served prior to the liquidation of the Company, but the money at the time of such liquidation still remained in Messrs. Kingston's hands.

Gall, for the applicants.—The garnishee order, after service, bound the money, and passed the property in it to Messrs. Harris, Scarfe, & Co. Even if it did not confer a legal right to the money, the Court has a discretion to refuse to interfere, which should be exercised in this instance, as the Company had put Messrs. Harris, Scarfe, & Co. off from time to time by stating that the assets were ample to pay all the creditors—

Ex parte Joselyn, L.R., 8, Ch. D., 327
Ex parte Parry, *in re* Great Ship Co., 33 L.J., Ch. N.S., 245
United English and Scottish Assurance Company v. *Hawkins*, L.R., 3, Ch. App., 787
In re Richards & Co., L.R., 11, Ch. D., 676.

Stuart, for the Scandinavia Company, of Copenhagen.—This must be dealt with in the same way as an insolvency, Supreme Court Act, 1878, Section 6, Sub-section 1. The garnishee order passed no property and conferred no lien within the meaning of Section 160 of the Insolvent Act, 1860—

Holmes v. *Tutton*, 1 Jur., N.S., 975
Ex parte Joselyn *(ubi supra)*
In re The Printing and Numerical Co. (Limited), L.R., 8, Ch. D., 535
Slater v. *Pinder*, L.R., 6, Ex., 228.

Gall, in reply.—The Printing Company's case has been dissented from by FRY, J., and MALINS, V.C., and has been over-ruled by the Lords Justices, on appeal.

BOUCAUT, J.—I shall follow the ruling of the Master of the Rolls—There is no similarity between Section 87 of the English

Bankruptcy Act, 1869, and Section 160 of our Insolvent Act, and the reasoning which led to the over-ruling of the Printing Company's case seems to have depended on the former Section. I shall therefore dismiss the application with costs, £7 7s.

Application dismissed with costs.

1 AND 2 MARCH, 1881.

ROGERS v. LOUTIT.

SEAMAN—Owner—Warranty of seaworthiness.

In an action by a seaman against the owner of a vessel for injuries sustained through the defective state of the ropes, the plaintiff must show, not merely that the ropes were defective, but that they were so to the knowledge of the defendant, there being in accordance with the decision in Couch *v.* Steele *no warranty of seaworthiness by the owner in favour of the seaman.*

ACTION for damages.

The plaintiff was a seaman on board a vessel of which the defendant was Master and part-owner. While engaged in furling a sail, the foot-rope of the cross-jack-yard, being defective, broke, and the plaintiff fell on to the deck from a height of 30 feet, and sustained serious injuries. The evidence did not satisfy the Court that the defendant was aware of the defective state of the rope, or that his attention had been called to that fact.

Wigley and *C. C. Kingston* for the plaintiff.

Symon, Q.C., and *Dempster* for the defendant.

BOUCAUT, J.—I am asked to find a verdict for the plaintiff on the ground that the defendant both ought to have known and did know that the rope was dangerous. That is going too far. *Couch* v. *Steele*, 3 E. and B., 402, shows that a sailor cannot sue an owner for injury by unseaworthiness unless there was a warranty of seaworthiness. If the evidence had shaped differently I might, however, even in this action, have had to examine into the mutual rights and obligations of owners, masters, and mariners. As it is I am dissatisfied with the evidence, both of the general notice, and of notice as to the one rope in question. Both are denied by the defendant, who says that he heard no complaint until the men went aft after the accident; and in this he is confirmed by his officers, who say that they did not report any complaints to him.

The suggestion of negligence is further negatived by the conduct of the men, who, according to their own statement, condemned only one or two ropes, and, according to the statement of the officers, condemned none at all. If the men had found any rope to be in a condition dangerous to life, it was their duty to tell the captain plainly of the fact and that they could not go upon it, and they would have then been justified in not doing so.

Verdict for defendant, with costs.

WAY, C.J., AND A JURY.] [CIVIL SITTINGS.

9 MARCH, 1881.

DIXON v. BAILY.

SLANDER.—Privilege—Malice.

Plaintiff, who had previously been practising medicine in this colony without any legal qualification, in May, 1876, *left for England, whence he returned in November,* 1877, *having, during his absence, obtained his diploma as Licentiate of the Apothecaries' Hall Dublin, registered himself, by virtue thereof, as a British medical practitioner; and also obtained the diploma of M.D. of a Philadelphia University, not recognized in this colony, nor in England.*

On his return to this colony plaintiff, relying on the British certificate and the Dublin diploma, applied to the Medical Board to grant him a certificate of registration under the Medical Act, which application the Board at first refused to accede to, but subsequently, on being threatened with proceedings for a mandamus, granted.

On the 3rd October, 1880, *the defendant, a member of the Medical Association, laid before the Association certain charges against the plaintiff, with a view to his expulsion from the Association; and, on the following day, said to G., also a member of the Association in reference to such charges, "I brought some charges against (plaintiff) as he is not duly qualified, and on these grounds I sought his removal as a member of the Society. He is an impostor, and his diplomas are forgeries. Either the diplomas themselves were forged or the necessary documents to get himself examined were forgeries. Such men ought not to be allowed to practise, and a stop should be put to it. The degree he has comes from that stinking little Apothecaries' Hall in Dublin." G. then asked defendant how plaintiff managed to pass the Board here, to which defendant replied, "partly by bounce and partly through the forgeries not being detected; but the people in Norwood will soon find out what an impostor and scoundrel he is. I can prove from the time he left this colony, how long he was in Dublin."*

In December, 1880, *plaintiff and defendant, being both candidates for the position of medical officers of a certain lodge, a deputation from that lodge waited on defendant with an application signed by plaintiff with the addition M.D., and setting out the terms on which he was prepared to accept the position, and the deputation asked the defendant if he would undertake the duties on the same terms. The defendant on seeing the application, said of plaintiff, "He has no right to sign himself M.D. He is an impostor." Shortly afterwards the defendant, in answers to enquiries made by another member of the Lodge, repeated the same statement.*

Held.—*That the occasions on which the above statements were made were privileged, and that there was in the statements themselves, no intrinsic evidence of malice.*

ACTION for £1,000 damages.

The facts sufficiently appear from the head-note and judgment of WAY, C.J.

Downer, Q.C., and *Symon* for the plaintiff.

Mann, Q.C., and *Pater* for the defendant.

WAY, C.J.—I am of opinion that there is no evidence to go to the Jury. The plaintiff, who had been practising for some time previously, went to England a few years ago and returned a short time afterwards in possession of the qualifications of a legally qualified medical practitioner. In addition to this, he had possession of a document purporting to grant him the title of M.D. from a university in America, the examination for which took place before a non-medical gentleman living in some remote suburb of London. Amongst the medical profession here, there was the opinion that he could not have obtained a British qualification regularly, and, with respect to the American qualification, it was admitted that he did not attempt to register himself at all under it. His certificate of registration in this colony was refused by the Medical Board for some time, but he threatened a *mandamus*, and it was granted almost immediately afterwards. Some little time prior to this action, he and the defendant were candidates for the position of medical officer to a Druid Lodge, and a deputation, appointed by the Lodge, waited upon the defendant for the purpose of asking him if he would accept the medical officership of the Lodge on the same terms as had been offered by the plaintiff. At the same time the plaintiff's letter to the Lodge was shown to him, and, at the end of the letter, the plaintiff signed himself M.D. The plaintiff must be presumed to have been aware that he had not been registered under this title, and that his qualifications were only American. This being the case, it appears to me that the defendant had an interest in showing that the person who was a candidate as well as himself for

the position of medical officer of the Lodge, did not possess the qualifications he had assumed, and he did no more than this in the conversation with Mr. Sellar. "He must be an impostor," was the effect of the conversation. "He has no right to sign himself M.D. He is an impostor." It appears to me that if we were to deal with the privilege or right possessed by the defendant by inquiring exactly and accurately what he ought to have said, or what any one else ought to say under similar conditions, we should be really frittering every privilege away. Then, as to the second occasion, in that the defendant was not merely asked if he would accept the position on the same terms as the plaintiff offered, but the question was put directly to him, if the plaintiff were a properly and legally qualified practitioner. He answered that he was, and left the matter there until further inquiries were made by Mr. Veitch, who had a perfect right to prosecute these inquiries as to the plaintiff's qualifications. Thus it appears to me that both of these occasions were privileged, and there does not appear to be any evidence of direct malice in the conversation with another member of the same Association on the day after the meeting took place, and in which the defendant repeated to him the result of the meeting with respect to the plaintiff's qualifications. There is not, in my opinion, any evidence of express malice to place before the Jury; and the plaintiff will therefore be nonsuited.

Nonsuit.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [COMMON LAW.

18 AND 24 MARCH, 1881.

IN THE MATTER OF F. W. WILLIS AND OF THE LICENSED VICTUALLERS ACT, 1880.

LICENSED VICTUALLERS ACT, 1880—*Secs.* 38, 39, 40.—*Notice of Objection—Mandamus.*

The Inspector of Public Houses, in due time before the then next annual meeting of the Licensing Bench, delivered to the Clerk of the Bench a notice in writing, in duplicate, of his intention to oppose the granting to A, a licensed victualler, of a renewal of his licence, on the ground that the management of his licensed house had not been satisfactory, in that he had allowed prostitutes to assemble therein; and the Clerk forthwith posted to A one copy of such notice.

The Bench at its meeting heard the Inspector in support of his objection, and at the close of the evidence retired to a private room to consider its decision.

On its return to Court the Bench refused the licence, but gave no reasons for such refusal.

Beyond the testimony of the Clerk as to the posting of the notice, there was no evidence of the delivery of any notice of opposition to A.

Held—*That there was no proof of any delivery of notice as required by Sec.* 40 *of the Licensed Victuallers Act*, 1880, *and that A was entitled as of course, under the* 38*th Section of that Act, to a renewal of his licence, and a mandamus issued to the Bench to sit and grant such licence accordingly.*

Semble—*That the Bench was justified in retiring to a private room to consider its decision; but that, even if notice had been proved to have been duly delivered to A, he would have been entitled to a mandamus to the Bench to hear and determine on the ground that it had given no reasons for the refusal of the licence.*

RULE calling upon the Adelaide Licensing Bench, and the Inspector of Public Houses, to show cause why a mandamus should not issue, directing the Bench to grant to F. W. Willis a renewal of his publican's licence, or, in the alternative, why they should not appoint a day within a reasonable time, by way of adjournment of the annual licensing meeting, to hear and determine the application of Mr. Willis for such renewal on the following grounds :—

I. That no notice in writing of objection was delivered, so as to satisfy Section 40 of the Licensed Victuallers Act, 1880.

II. That the notice of objection sent to the Clerk contained no valid ground of objection under Sections 38 and 41 of that Act justifying a refusal to renew.

III. That the Justices announced no grounds, or reasons, for such refusal, as required by Section 56 of that Act.

IV. That the consideration was not public as required by Section 38 of that Act, but partly private.

V. That no evidence was given in accordance with paragraph 11 of Schedule V. of that Act.

VI. That the applicant had no notice to attend the licensing meeting, as required by paragraph 4 of the said Schedule V.

On motion for the rule on the 18th March, the following authorities were cited :—

Licensed Victuallers Act, 1880, Sections 38, 39, 40, 41, 56, and 74, Schedule V., paragraphs 4 and 11.
Reg. v. *Smith*, L.R., 8, Q.B., 146.
Reg. v. *Farquhar*, L.R., 9, Q.B., 258.
Reg. v. *Sykes*, L.R., 1, Q.B., D., 52.
Ex-parte Smith, L.R., 3, Q.B., D., 374.

Smith now moved that the rule be made absolute.

Downer, Q.C., showed cause—The omission of the Bench to state its reasons might be a ground for mandamus to state the same, but not to hear and determine. [BOUCAUT, J.—Yes—*Ex-parte* Smith *(ubi. sup.)*, and that even though they are not asked to do so. — *Reg.* v. *Sykes (ubi supra).*] Then as to their having retired to consider— [WAY, C.J. — You need not trouble about that. We should require express words to confine their retirement to the question of voting only.] As to the 5th ground it must be presumed that the Bench,

having refused the licence, found what was essential to justify such refusal, viz., that the house was not required in the locality. [BOUCAUT, J.—When, by withholding reasons, they fly in the face of the Statute, we can entertain no presumption in favour of their reasons being good, or in accordance with the Statute.] [WAY, C.J.—*Reg.* v. *Sykes* is decisive. Lord BRAMWELL says :—"Until they have given their reasons they have not heard and determined according to law." Under our Statute they have to state not merely the objections they proceed upon, but the grounds of their refusal.] As to the first ground, there was proof of posting of the notice, and the attendance of the applicant in consequence. [WAY, C.J.—He is entitled to two notices—one, of the objections, the other, to the same effect, stating the name of the objector, but I think both might be given in one.] The affidavit of the applicant does not negative the receipt of the notice, but merely says that it was not delivered to him. [WAY, C.J.—Perhaps the right to the warning to attend would be waived by attending.]

Smith, in support of the rule.—The objection stated in the notice does not come under any of the heads mentioned in Section 41 Moreover, the notice was never delivered. In addition to the posting of the notice by the Clerk, required by Section 39, it is necessary that the publican should have a notice "delivered" to him under Section 40. It is not pretended that this was done; nor was there any warning as required by paragraph 4 of Schedule V.

WAY, C.J.—The Act entitles you to a renewal as of course, unless you have had notice of a valid objection against renewal. No such notice has been delivered in this instance, and you are therefore entitled to a mandamus to grant a renewed licence unconditionally, and there will be a rule absolute in these terms.

Rule absolute accordingly.

24 MARCH, 1884.

REG. v. SMITH.

LARCENY—Attempt to cheat.

Prisoner and B were playing cards, when they were joined by the prosecutor and A and P, who had just met with the prosecutor; and there was evidence from which the Jury might infer that A, B, P and prisoner were acting in concert.

Prosecutor was induced to take part in certain manipulations with the cards, with the result that prisoner won from him £10.

Held.—*That though there might have been evidence of an attempt to cheat, there was nothing to support a conviction of larceny against prisoner.*

SPECIAL case stated by BOUCAUT. J., under the Criminal Law Consolidation Act.

The facts were as stated in the headnote.

Downer, Q.C., for the prisoner.

WAY, C.J.—There may have been an attempt to cheat on the part of all four, but certainly not any attempt on the part of the prisoner to steal from the person. The prisoner must be discharged.

Prisoner discharged.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [COMMON LAW.

24 MARCH, 1881.

DIXON V. CLARKE.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—Untransferred Shares.

A debtor having sold to A certain Building Society shares, and received A's acceptance in payment of the purchase-money, subsequently assigned his estate to A, under the Insolvent Act, 1860, *as trustee for the benefit of his creditors. A new trustee in place of A was afterwards appointed. At the time of the assignment, and of the appointment of such new trustee, the shares still stood in the debtor's name.*

Held—*That the shares were the property of A, and that he was entitled to the proceeds thereof, notwithstanding the assignment.*

APPEAL from the Local Court of Penola.

The plaintiff was the Trustee under a deed of assignment made by one Neilson for the benefit of his creditors, under the provisions of the Insolvent Act, 1860. And the defendant was the original trustee under such assignment, in substitution for whom the plaintiff was afterwards appointed.

Prior to the assignment Neilson had sold to the defendant some Building Society shares, for £50, receiving in payment therefor the defendant's acceptance for that amount.

The defendant, after the appointment of the plaintiff, as such trustee as before-mentioned, sold the shares, which until then had remained in Neilson's name, for £47 10s., and received the purchase-money, which amount the plaintiff, as trustee under Neilson's assignment, sought to recover in the Penola Local Court, where, on the trial, a verdict was given in favour of the plaintiff for the amount claimed.

Downer, Q.C., having previously obtained a rule *nisi* to set aside the verdict and enter a nonsuit, now moved that such rule be made absolute.

Stuart showed cause.—There are circumstances of suspicion which might fairly be left to a Jury, and that being the case, the Court will not disturb the verdict.

BOUCAUT, J.—There were none that were not negatived.

WAY, C.J.—The shares having been sold, though not transferred by the debtor at the date of the deed could not pass under the deed. There must be a rule absolute to enter a nonsuit, with costs.

Rule absolute.

BOUCAUT, J., AND A JURY.] [CIVIL SITTINGS.

20 APRIL, 1881.

BONNEY AND WIFE v. THOMAS.

LIBEL.—Privilege—Malice—Newspaper report.

Defendant published in his newspaper, amongst the Police Court reports, the following:—"J. B., wife of C. B., was charged, on the information of W., with stealing from her one woollen antimacassar, valued at £1 10s. The prisoner took the article from the prosecutrix's house without permission. The prosecutrix then served her with a summons, when she returned the article.—Dismissed."

This report was inaccurate in describing J. B. as the prisoner, she having been brought before the Court on summons, and not on warrant, and in stating that she had returned the antimacassar after she had been served with a summons, the return having been made prior to such service, and the fact that J. B. was the wife of C. B. did not transpire in the Police Court.

It appeared, however, that a great deal of altercation had taken place in the Police Court between J. B. and W., and that W. had stated in one portion of her evidence "I summoned her and she returned it," though she afterwards stated that the return had been made before summons.

Immediately after the publication of this report J. B. called at the defendant's office, complained of the inaccuracy of the report, and threatened proceedings unless an apology were published, and subsequently instructed her solicitor to write to the same effect.

The defendant thereupon published in his newspaper, in a conspicuous part, the following paragraph:—"Mrs. J. B. has represented to us that the report is inaccurate, and that the antimacassar was returned before the service of the summons. The evidence also set down by the Clerk of the Police Court does not give any inkling of this having been proved, but, from enquiries we have made, we believe that such was the fact. This being so, we willingly give prominence to that view of the matter, for the whole charge seems to have been a paltry one, and was promptly dismissed by Mr. Beddome."

Held—*That the last paragraph was no libel, but that there was evidence to go to the Jury, as to whether the report was fair, honest, and substantially, though not absolutely, accurate.*

This was action for libel against the proprietors of the *Register*, and the statement of claim was as follows:—"1. The plaintiff (Charles George Bonney) is a Civil servant in the Government service, and the plaintiff (Jane Elizabeth Bonney) is his wife. The

defendant was at the time of the grievances hereinafter mentioned and still is the printer and publisher of two newspapers called the *S.A. Register* and the *Evening Journal*. 2. The defendant being such printer and publisher as aforesaid, on the 15th and 16th days respectively of February, 1881, falsely and maliciously printed and published in the said newspapers of and concerning the plaintiff, the said J. C. Bonney, the words and figures following; that is to say—"Jane Elizabeth Bonney, wife of Charles Bonney, was charged, on the information of Rose Wertheim, with stealing from her one woollen antimacassar valued at £1 10s. Mr. Mathews appeared for the prosecutrix. The prisoner took the article from prosecutrix's house without permission. The prosecutrix then served her with a summons, when she returned the article. Dismissed." Meaning thereby and imputing to the plaintiff, the said J. E. Bonney, that while she was in custody on the charge of stealing evidence on oath had been given that she feloniously took the antimacassar from the prosecutrix's house, and that, after being served with a summons, she returned the same, and thereby meaning that the said plaintiff was in custody on a charge of felony, and that a credible witness had in a Court having jurisdiction in the premises sworn to the truth of such charge. 3. The defendant, being such printer and publisher as aforesaid, falsely and maliciously printed and published of and concerning the said plaintiff in the said newspapers on the 18th day of the aforesaid month the words following:—"Mrs. Bonney has represented to us that the report is inaccurate, and that the antimacassar was returned before the service of the summons. The evidence also set down by the Clerk of the Police Court does not give any inkling of this having been proved, but from enquiries we have made we believe that such was the fact. This being so, we willingly give prominence to that view of the matter," and the words "the whole charge seems to have been a paltry one," meaning by the premises that although the said charge was denied by the said plaintiff, and had been dismissed by the Police Magistrate, it was yet a matter of doubt and paltry although not untrue. 4. In consequence of the premises, the plaintiffs have been and are greatly prejudiced and injured in their credit and reputation, and have suffered much mental anguish. The plaintiffs claim £500.

The defence was as follows :—1. The defendant does not admit the allegation in paragraphs 1 and 4 of the statement of claim. 2. The defendant is a public journalist, and the said words were printed and published by him as such public journalist, in a public journal, *bona fide*, without malice, and for the public benefit and not otherwise, and they were a correct, fair, impartial, and honest report of proceedings of public interest. 3. The defendant denies that the alleged libels or either of them were or was printed and published falsely and maliciously of the plaintiff, Jane Elizabeth Bonney, or with the meanings or any of them alleged in paragraphs 2 and 3 of the statement of claim.

Smith, for the plaintiff.

Symon, Q.C., for the defendant.

BOUCAUT, J., directed the Jury as follows :—This is an action in which Mr. Charles Bonney and his wife seek damages for the publication in the *Register* and *Evening Journal* newspapers of two alleged libels; the first being alleged to be a libel in respect of the report of some proceedings in the Police Court; and the second being alleged to be in respect of a statement referring to that report which was afterwards put in the *Register*, and which has been spoken of by the learned counsel for the plaintiff as a *quasi* apology, adding insult to injury, and increasing the damage done by the report. I think I shall simplify the case and shorten it if I say at once that it will not be competent for the Jury to give any damages as against the defendant in respect of the second alleged libel, as the plaintiffs have in no way shown it to be a libel, the statement being brought about by the lady herself in requesting the defendant to put something in to correct the report. There was nothing whatever in the comment of the *Register* of February 18 which showed that it was other than a fair and reasonable apologetic statement in respect of Mrs. Bonney's request. The Jury may if they choose look at that with the view of considering the animus or the alleged animus stated to be in the defendant's mind with respect to the first report; but with respect to the second I direct the Jury that there is no libel, and the plaintiff's

are not entitled to damages upon it. Then the Jury have to consider the question of the report. A libel is a statement which injures or offends any person, or brings him into contempt and disrepute with his fellow-men. Undoubtedly in this sense the report is a libel, but that it is to be taken with many qualifications, though it is not necessary for me to go into an elaborate statement of the law of libel just now. There are many instances in which a newspaper may publish certain things affecting people's characters, and this is one of them, provided the report is a fair and accurate one, that is subject to my ruling on question of privilege, which will depend upon the finding of the Jury on the question of the accuracy and fairness of the report. I do not feel inclined to withdraw the case, as the Attorney-General asked me to do, because there is a difference between this case and that of a public writer making hot and earnest comments on matters of public interest bearing their *bona fides* on the face. In the one case the Judge rules the writer to be privileged, and there must be some evidence of malice to allow the case to go to a Jury; but here the matter is somewhat otherwise. This publication is not precisely privileged in the same way as in the other case. It is not privileged unless the Jury believe it is a fair, accurate, and *bona fide* report. If they believe that it is so, then undoubtedly their verdict must go for the defendant. I cannot withdraw the case, because the defendant says this is privileged occasion and that there is nothing to go to the Jury. Before I can hold that, the Jury must answer the preliminary question. This question of privilege is a matter of the very greatest importance, no doubt. The Queen's Courts are open to all classes of her subjects, subject, in certain cases, to a right to have the doors closed, and to the room at the disposal of the Court. This is quite proper, so that the people may know what is being done in the Courts, and keep an eye on them to see that there is no straining of the law, and there is undoubtedly a privilege for newspapers to report what goes on in these Courts. Everybody is not able to go there, and all being interested in knowing that things are conducted properly they get the necessary information secondhand from the newspapers, so that it is important that this work should be preserved, with the qualification that the reports are fair, accurate, and *bona fide*. It is

manifest that the newspaper cannot report every word said in the Courts of Justice. It would be too onerous, and they could not be expected to do it. Therefore they are permitted, and indeed have the right, to give abstracts, such as the report in the present case, short histories, photographs, so to speak, of what takes place, on condition that they are fairly just. If any inaccuracies or mistakes get into the reports, so long as they are honestly made and do not alter the tone, so to speak, of a case as reported, the newspapers can be excused, but they are required by law to show a reasonable and fair amount of discretion in making these abstracts. The learned counsel for the plaintiffs has been very severe on the supposed boys who carry out this reporting, and undoubtedly, if there were any evidence to show that a boy without judgment and discretion were sent out and made a bungle of the case, then it would be a matter of comment for me, and of consideration for the Jury, but this has not been proved. The learned counsel has sought to show the Jury that this is not an honest report of the proceedings themselves, and the whole question lies in a very small compass. He says that the words "wife of Charles Bonney" were imported. The *Advertiser* does not set forth that the case was in respect of this lady, as the wife of this particular gentleman, and, undoubtedly, as *Mr. Smith* fairly said, it would be something which the Jury would have to weigh in their consideration. It must be a painful thing for Mr. and Mrs. Bonney to be placed in the position in which they found themselves, and she was justly annoyed at the report not being quite accurate, but the measure of her feelings must not be the measure of the Jury's judgment. The reporter must not go beyond what takes place in the Court, and if he does so, for the purpose of heightening his report—to make it pleasurable or exciting to his readers, it would be, according to the circumstances of the case, considerable evidence of malice. The Attorney-General shows, very properly, that nothing of the sort took place here. It does not appear from the evidence of the Clerk of the Court that the whole of the information was read out, or that particular part of it in which the name was mentioned, but my ruling is that there is no evidence of malice with respect to specifying who Mrs. Bonney was, because the papers are generally allowed to lie about

on the table in Court, and the reporters are allowed to look at them. It would be competent and fairly just for the reporter to get the correct names of the parties in this way, and better than otherwise to trust to the papers themselves than to his own impressions. I qualify this by saying that the reporter has no right to go into the Magistrate's room, or to look at the papers without the Magistrate's permission; but that does not appear to be the case here. If the Jury find that the report is not a fair and impartial one they must find for the plaintiff. *Mr. Smith* put stress on the fact of Mrs. Bonney being called "the prisoner," and that may be the very slightest evidence of malice. I cannot agree with the Attorney-General as to her being a prisoner. She was not in custody, and the Magistrate could allow her to leave the Court without taking any bail for her reappearance, and she would not be a prisoner until made so by some act of his. It is very general to speak of persons in similar positions as Mrs. Bonney as prisoners, and the mere fact of speaking of her as one would not be sufficient evidence of malice, unless coupled with something more serious. In this case—and this is the real gravamen of the charge—Mrs. Bonney was spoken of as having been served with a summons before she returned the antimacassar. *Mr. Smith* puts it, and therefore I think I ought to put it to the Jury, in justice to the defendant, that he does not suppose there was any substantial or particular malice in the defendant's mind as against the plaintiffs in this case, and I think the Jury ought to take that view of the *quasi* apology or apology, as they may look upon it, into their consideration. This is undoubtedly exceedingly important. If it could be shown that this lady having been served with a summons, then returned the antimacassar, it would have weighed more in Mr. Beddome's mind than facts presented to him did, although, as he himself says, it would not have been conclusive in the case. There may have been a dispute about the antimacassar, and, to prevent any further trouble, Mrs. Bonney may have thought fit to return it after she received a summons. The Magistrate was entitled to weigh all this. The evidence is sufficiently satisfactory to-day that she returned the antimacassar before she was served with the summons, and if it was so clearly stated in the Police Court the *Register* ought to have taken notice

of it. But then there comes an ambiguity. Mrs. Bonney says to-day that Mrs. Wertheimer said in the Police Court, "I summoned her and she returned it," and she afterwards said she returned it before she was summoned. There is no doubt that an ambiguity lay in this, and, if the reporter had relied on it to make the case blacker than it really was as against Mrs. Bonney, the Jury must say his report is not accurate or fair. This ambiguity is capable of two meanings, namely, that Mrs. Bonney returned the antimacassar after the summons was issued, or after it was served, and upon that the whole case turns. The statement in the report is that "the prisoner took the article from the prosecutrix's house without permission. The prosecutrix then served her with a summons." Undoubtedly that is inaccurate. It appears to-day so, but it does not appear to have been stated in the Police Court, and this is one of the occasions on which, as mentioned in my preliminary remarks, a newspaper is justified in making an abstract report, provided it is fair and done without malice. If from the ambiguity which arises the Jury come to the conclusion that such a mistake might reasonably have been made by the reporter as has occurred, then they ought to find for the defendant. I do not want to lead the minds of the Jury at all upon what is particularly for them to decide, and, while protecting the writer in the newspaper to a fair degree with the relief the law allows, I must protect the plaintiff as well. I do not want to put the case too strongly for the defendant, but the Jury must see that I fell into the same mistake in taking the evidence as the reporter when I interrupted to ask *Mr. Smith* if he was going on with the case after Mrs. Bonney said she used the words "She summoned me and I returned it." I took the wrong meaning in the case because of the ambiguity, and I say that because, from the way in which the apologetic article is mentioned in the Judge's copy of the record, I took a view rather the contrary. On that I will say two or three words presently. Having read the part of the apologetic paragraph put in the pleadings, I perhaps put my question as to *Mr. Smith's* going on with the case too hurriedly, and having fallen into the ambiguity myself it is for the Jury to say whether the report is substantially fair and correct, and that the inaccuracies are excusable. Then they have to look at the second article

published, which *Mr. Smith* says added insult to injury. They are not entitled under any aspect of the case to give damages upon it, because it is called forth at the instance of the plaintiff herself; but they may look at it from the other point of view in adding insult to injury, which ought to have weight in the consideration of what was in the defendant's mind when the article was published. That was a fair argument of *Mr. Smith's*. He says, "They not only call us prisoners, when we were defendants, but they sneer at us afterwards," and the Jury have to read not only what *Mr, Smith* has put in the declaration, but the whole article. There is nothing I can suggest as being any evidence of sneering at all. The article said—"In our report of the case of Mrs. Jane Elizabeth Bonney it was stated that the article had been taken from the house of the prosecutrix, and that the prosecutrix then served her with a summons, when she returned the article. Mrs. Bonney has represented to us that this report is inaccurate, and that the antimacassar was returned before the service of the summons." That is correct; Mrs. Bonney says so. The article then proceeded —"The evidence taken down by the Clerk of the Police Court does not give any inkling of this having been proved," and the paper is undoubtedly correct in that from the evidence read by the Associate. The article also stated—"But from enquiries we have made we believe that such was the fact." When newspapers make mistakes they ought to frankly give an explanation, and *Mr. Smith* says this has not been done in the present case; but I think the explanation is reasonably frank, and that the defendant could be fairly excused under the circumstances. I can in no way see anything but *bona fides* in acknowledging these mistakes, and on a demurrer I should rule that the second article is not capable of the innuendo drawn from it in the pleadings. It leaves the case clearly in favour of Mrs. Bonney, though it is for the Jury to say whether they find anything in it capable of the dark innuendoes, irony, and sarcasm which the learned counsel for the plaintiffs has pointed out. It is, I think, a reasonably fair apology in respect of the unfortunate ambiguity, and if the Jury think so the defendant must not be punished for the mistake. I have pointed out the ambiguity, and shown how I fell into the same mistake in the case; and if the Jury believe

the report was fair, honest, and substantially though not absolutely correct, they must find for the defendant.

Verdict for defendant.

BOUCAUT, J.] [COMMON LAW.

7 APRIL, 1881.

IN THE MATTER OF THE ADELAIDE SEWERS ACT, No. 106 of 1878, AND IN THE MATTER OF THE LANDS CLAUSES CONSOLIDATION ACT, No. 6 of 1847, AND OF ONE WILLIAM LE GALLEZ.

LANDS CLAUSES CONSOLIDATION ACT of 1847.—*Adelaide Sewers Act*, 1878.—*Possession—Title.*

To entitle himself to payment out of Court of money deposited pursuant to the 76th Section of the Lands Clauses Consolidation, in respect of land taken by the Commissioners of Sewers, under the powers contained in the Adelaide Sewers Act, 1878, *the petitioner must either show title, or possession for twenty years and upwards.*

PETITION for payment out of Court of the sum of £160, the assessed value of allotment 57, of Section 379, in the Hundred of Yatala, which sum had been paid into Court by the Commissioner of Sewers, pursuant to Section 76 of the Lands Clauses Consolidation Act, 1847.

The affidavit in support of the petitioner set out that, in December, 1871, the petitioner purchased from one John Quayle, who was then in possession, the allotment in question, and immediately after such purchase was entered into, and up to the taking of the land by the Commissioner of Sewers, continued in possesssion of the same.

Nesbit for the petitioner.—I rely on Section 79 of the Lands Clauses Consolidation Act, 1847, under which it is only necessary to show possession at the time of the taking of the land. [BOUCAUT, J. —There is no precedent of any such order having been made, where the petitioner, or those through whom he claims, have not been in possession for twenty years.] Yes—In *re* Evans, 42 L.J., Ch. 357.

BOUCAUT, J.—In that case it was shown that there had been possession for twenty years, and unless that can be shown I shall make no order.

Nesbit.—I ask for an order for investment of the money, and payment to the petitioner of the interest.

Downer, Q.C., for the Commissioner of Sewers. So far as appears the petitioner is a mere trespasser, and not the owner of the land. I ask that the money be retained and petition be dismissed.

BOUCAUT, J.—There will be an order for investment and payment of interest to the petitioner. The petition will be dismissed, with costs, with liberty to the petitioner to file a fresh petition.

Petition dismissed accordingly.

WAY, C.J., ANDREWS, J.] [COMMON LAW.

2 MAY, 1881.

IN THE MATTER OF F. H. E. SIEKMANN, AND OF THE INSOLVENT ACT, 1860.

INSOLVENT ACT, 1860, *Sections* 182 *and* 183.—*Assignment for benefit of creditors—Arrest—Protection order.*

A debtor under arrest for debt made a deed of assignment in accordance with the provisions of Division VI. of the Insolvent Act, 1860, *the deed containing a release from all debts.*

After the execution of the deed the debtor obtained a protection order under the 182*nd Section of the Insolvent Act*, 1860.

Held—*That the debtor was not entitled by virtue of the protection order to be discharged from custody, but that, as the deed was binding on all the creditors and contained a release from all debts, it would be an abuse of the process of the Court to detain the debtor in custody, and he must be discharged.*

THIS was a return to a writ of *habeas corpus*, directing the keeper of the Adelaide Gaol to bring up the body of Francis Henry Ernst Siekmann. The return showed that the prisoner was detained by virtue of a writ of *ca. sa.*, issued out of the Supreme Court, and, from the affidavits on which the writ was obtained, it appeared that, subsequent to arrest, the debtor had, in conjunction with his partner, John Moule, made an assignment, pursuant to the provisions of the Insolvent Act, 1860, and had, by virtue of such assignment, obtained a protection order under Section 182 of the Insolvent Act, 1860. It was admitted that the assignment contained the usual release from all debts.

Symon (Attorney-General) moved that the prisoner be discharged. The words "hereinafter provided for" in Section 182 of the Insolvent Act, 1860, read in conjunction with Section 183 up to the words "annexed" refer to the order for protection from arrest, not to the arrest itself, in which case nothing so far in the two sections limits the operation of the words "arrest or imprisonment" to an arrest or imprisonment after the granting of the protection order, and the remaining words in Section 183 are mere machinery. The Legislature in framing Section 182 meant

it to deal with the whole state of affairs as they existed at the time of the execution of the deed; and in the second part of Section 183 power was given to the Insolvency Court to do what would otherwise be only in the power of the Supreme Court to do, namely, discharge a debtor arrested or imprisoned after the execution of the deed, thus providing for only one of two contingencies, the other being the case of arrest or imprisonment before the execution of the deed. The two sections were intended to preserve the liberty of the person and to get rid of unnecessary delay, but while the one case was provided for, the other, which has occurred in the present instance, was left totally unprovided for. The result would be, if my contention be incorrect, that any debtor arrested prior to the Act of 1870, between the date of the deed and the passing of the amendment, might have been in custody for ever. [WAY, C.J.—Until he got himself discharged by a petition for insolvency.] The execution of the deed is equivalent to the insolvency. [WAY, C.J.—After a deed of assignment he is entitled to go out, because if the execution of the deed discharges him from his debts it is the same as if he had paid his detaining creditor.] If it be argued that the deed was a deed *nisi*, so to speak, until the expiration of the number of days provided for in the Act, then the protection order comes into operation and entitles the debtor to be freed from imprisonment. *Cui bono* that he should be kept in prison when he has parted with everything. He would be kept in gaol for ever unless he lay there for twenty-one days and became insolvent. I therefore come back to the difficulty created by the original Section 182, that the order for protection from arrest frees the debtor from any arrest or imprisonment. [WAY, C.J.—The order for protection from arrest is for a limited time, and, if your contention is right, the effect would be that if he got out on that order he could not be put in again, as the writ of *ca. sa.* would have expended itself.] The creditor would revert to his position as a creditor under the deed, if its effect were to relieve the debtor, just as if he had been arrested after its execution. [WAY, C.J.—Under Section 183 the Court gives him protection for such a period as it sees fit, and can renew the order from time to time, but if you take Section 182 as vesting a right, then the debtor is free from arrest or im-

prisonment on the production of the order and until the deed is set aside.] There is a *terminus ad quem*, but not *a quo*. [WAY, C.J.—Yes, on production of the order; but the *terminus ad quem* is different if you take Section 182.] Which is the *terminus a quo*, the date of the order or of the deed? [WAY, C.J.—The date of the order.] If so, what your Honor says applies to every debtor between the date of the deed and the order. [ANDREWS, J.—The latter part of Section 183 does not say arrest before the deed, as was the case in the present instance.] [WAY, C.J.—The question is, whether Section 182 and the half of 183 are to be taken apart, and the second half of 183 taken as ministerial, relating to mere procedure, or if the right granted under the section and a half is interpreted by the half section.] So far as Section 10 of the new Act goes the right cannot be interpreted by the latter part of 183. The matter affects the liberty of the subject, and if the Court thinks the right is created it will not be astute in narrowing down that right because of the words relating to procedure. The words "or imprisonment" are superfluous, unless they refer to something beyond the arrest. [WAY, C.J.—If the sections referred to arrest or imprisonment prior to the assignment, the collocation of the words would have been "imprisonment or arrest." My learned colleague has pointed out something which tells strongly against the Attorney-General's contention. In Section 57, where the Legislature intended to protect from arrest and imprisonment, the Court may by warrant free by immediate release.] All that shows that it was left out of Section 183, which is my whole argument. [WAY, C.J.—Is there a release in this deed?] It is admitted that there was a release. [WAY, C.J.—Then there can be no doubt this Court can discharge the debtor.]

Kingston for the execution creditor—By the arrest the creditor has satisfaction of his debt, which security the execution of the deed cannot deprive him of. [WAY, C.J.—Supposing the debtor had died, you would have a claim upon the estate still, and would hold the body in satisfaction; but having released him by the deed you hold him no longer.] My client is not in the position of a creditor bound by the deed. If the deed of itself worked the release, and if the Legislature intended anything of the sort,

where was the necessity for all the provisions in the Act relating to the point? [WAY, C.J.—A deed does not necessarily provide a release, but if it contains any release whatever the debtor would not be liable to an action, because he is in the position of an adjudicated insolvent.] We cannot even petition for such an adjudication. [WAY, C.J.—Because you have agreed to the deed of composition.] No; by the action my client has taken he is deprived of taking proceedings in insolvency as against the debtor,

Cohen v. *Cunningham*, 8 T.R., 123.

There is no provision for getting our money if Mr. Siekmann is let out, in consequence of the course we have pursued. [WAY, C.J.—You are in the position of signing a deed which absolutely releases him from the debt. The deed is absolutely binding unless the debtor is made insolvent in consequence of an order setting it aside.] My client has security for his debt, which he would be deprived of by the debtor's discharge,

Ex parte Knowell, 13 Ves., 192.

[*Symon*—In the case of

Thomson v. *Harding*, 3 C.B., N.S., 254

it is laid down that imprisonment is not absolute extinction of the debt.] [WAY, C.J.—You hold the debtor's body as security for the debt, and discharge him from that debt by the deed.] You may just as well ask a mortgagee to give up his security. [WAY, C.J.—Mortgagees are specially secured by the Act. I think the debtor is discharged from his debt by the deed, subject to his being made bankrupt, and of course you ask why all these elaborate provisions for protecting the debtor from arrest. The answer is that the deed does not necessarily contain a release.] The Court would not interfere if the deed did not provide for a discharge. [WAY, C.J.—Then the debtor would come under the provisions for protection. If he is not released to-day he will not be released in 20 years' time unless the estate pay 20s. in the pound.] If the deed operates as a release then all securities will be gone. [WAY, C.J.—No. If you held a mortgage, that would not be gone. You are in the same position as if the debtor had

become insolvent and the creditor had proved. A *ca. sa.* is not a satisfaction for debt in bankruptcy.]

WAY, C.J.—In this case the learned Attorney-General has not satisfied me with respect to the construction of Sections 182 and 183 of the Insolvent Act. The present inclination of my mind is that the arrest or imprisonment mentioned in the 182nd Section is interpreted by the language of the 183rd, and that the arrest or imprisonment referred to in the 182nd Section is an arrest or an imprisonment subsequent to the deed of assignment, and that the section does not apply to a prior arrest or imprisonment. Therefore the debtor would not be entitled to his discharge by virtue of the protection order which has been made in this case; but then the deed which has been produced contains an immediate release of the debtor from all his liabilities, and under the language of Section 179 the deed is made binding upon the creditors who have not signed it in the same way as if they had duly signed it. Now, if this particular creditor's name had been fixed to the deed, there can be no doubt whatever that the Court, in the exercise of its summary jurisdiction, would order the discharge of the debtor, on the ground that his being further held in custody would be an abuse of the process of the Court; but *Mr. Kingston* has argued that his client is no longer a creditor, because his debt is satisfied. It has been very properly pointed out, however, by the Attorney-General, and established by the various cases which he has cited, that it is not true to say that this debt is satisfied—that it is, properly speaking, extinguished. The effect of *ca. sa.* is to take away the creditors's remedy in respect of other process, but he is entitled to prove in insolvency, and in the case of this debtor he is still a creditor upon the estate. Under these circumstances it appears to me that I cannot follow the argument of the learned counsel for the detaining creditor. The position is that the execution creditor has, in effect, given a release to the debtor, and therefore he is entitled to a discharge.

ANDREWS, J., concurred.

Order for discharge.

4 MAY, 1881.

IN THE MATTER OF AN ACTION SMITH v. WEBBER.

MAINTENANCE.—Costs of action—Party interested.

A person, not a party to the record, who pays the costs of contesting an action, in the result of which he himself is interested, will not be held liable to pay the costs of the other party, if the party whose costs are so paid has a substantial interest in the matter in dispute.

RULE calling upon Mr. Thomas Caterer, schoolmaster, of Norwood, to show cause why he should not pay the costs of an action for ejectment tried at the Civil Sittings on March 14 last, between Alfred Smith (claimant), and Maria Webber (defendant). The defendant's defence was that she had been in possession of the disputed property for the statutory period of over twenty years, and was therefore entitled to it. Evidence was called rebutting the testimony of the defendant, and judgment was ordered for the plaintiff with costs. There was evidence on the trial that Mr. Caterer had purchased the property from the defendant, and had agreed to pay her costs of defending the action. An affidavit by Mr. Caterer in reply was filed to the following effect:—"Mrs. Webber, the defendant, had a substantial interest in the defence of the action, and the defence was conducted at her request, and for the defence of her interests in the property, which was the subject of the action. Previous to the action I had agreed to purchase the property. I had paid her a portion of the purchase-money, but a lot was due at the time of the service of the writ."

B. Moulden moved that the rule be made absolute.

Sheridan showed cause.

Where a defendant on the record has a real and substantial interest in the action, another person who helps her with the defence, is not liable to pay the costs.

Thrustout dem Jones v. *Jones*, 10 B. & C., 106.
Hayward v. *Giffard and Grove* 4W. & W., 194.
Hutchinson v. *Greenwood*, 1 Jur. N.S., 329.
Mobbs v. *Vandenbrand* 10 Jur. N.S., 745; 33 L.J, Q.B. 177
Anstey v. *Edwards* 16 C.B., 212.
Dalbiac v. *Delacourt*, L.R. 10, Ex. 210.

WAY, C.J.—You say, assuming Caterer's position to be as stated, that the reason why he should not pay the costs is because Webber had a substantial interest in the subject property, and was not merely defending the action for Caterer.

ANDREWS, J.—The affidavit does not deny that Caterer agreed to pay the costs.

Sheridan—It is not necessary.

Wright v. *Smith*, 8 Dow, P.C., 517.

Moulden in support of the rule. In *Anstey* v. *Edwards*, the nominal defendant was the lessee of the plaintiff, and the real persons on whom it was sought to fix the payment of the costs were the equitable mortgagees of the lease. The distinction between the two lay in this—that in the one quoted it was disputed that the Banking Company gave any retainer, or agreed to pay the costs of the suit. [WAY, C.J.—The Company had the complete conduct of the action.] Then the fact of the verdict having been given against Mrs. Webber shows that she had no interest in the property at all. Caterer had an interest in it, because he had paid Mrs. Webber money on account of a supposed purchase of an interest which she could not convey. [WAY, C.J.—If Webber had no interest, because the verdict was against her, Caterer could have had no interest, because the verdict went against the person who had agreed to sell to him. There is no doubt whatever that Caterer was interested in the defence of the action, and so was the Bank in the case of *Anstey* v. *Edwards*.] In this case the defendant Webber was a mere interloper. She was a tenant of the plaintiff's, and so was Edwards a tenant of Anstey's. [WAY, C.J.—I think the foundation of the position in Edwards's case was that Edwards had an interest in the property, and Webber also was not a

pauper set up by Caterer, but had an interest in defending the action as much as Caterer, and perhaps more. If the rule of law goes far enough, I should think it was right for Caterer to pay; but I do not think you will be entitled to extend the rule. So far as the case has gone, I do not think we can make Caterer pay under the rule.] Although Webber may have had no interest in the property, Caterer had a large interest in the result of the action. [WAY, C.J.—So the Bank had in *Anstey* v. *Edwards*. That case was on all fours with the present, except in respect to the instructions to the attorney. If Webber were Caterer's tenant, then he would have a right to defend the action, but having a mere equitable interest in the property he had no such right, though Webber had a perfect right.] But Caterer had taken possession of the land. [WAY, C.J.—That is not in evidence. Besides, when the action was brought Webber was in possession of the property, or the action would have been brought against Caterer. We must, however, call upon you, *Mr. Sheridan*, for an affidavit showing what the actual facts are.

Sheridan—I am not sure, but I believe the amount paid by Mr. Caterer was about £30.

WAY, C.J.—We must have an affidavit showing the actual value and the balance owing. If it is a mere pretext that there were some few shillings or pounds coming to Webber I think you will have to pay the costs. The principle is that if a person having some mere nominal interest is used because he or she happens to be in pauper circumstances, to defend an action in order to shield the real defendant from the costs, the latter must pay them. But that Webber was helped by some other person is no reason whatever for making the person so helping pay the costs. If *Mr. Moulden* will not take the risk of the affidavit this rule will be discharged with costs. If he does take the risk there will also be at the further hearing, in the event of the rule being then discharged, the costs of the affidavit and *Mr. Sheridan's* attendance.

Moulden decided not to take the risk.

WAY, C.J.—Then the rule is discharged.

Rule discharged.

11 and 25 MAY, 1881.

IN THE MATTER OF THE CLAIM OF WILLIAM LE GALLEZ AND OF THE ADELAIDE SEWERS ACT, No. 6 OF 1878, AND OF THE LANDS CLAUSES CONSOLIDATION ACT, No. 6 OF 1847.

LANDS CLAUSES CONSOLIDATION ACT, 1847, *Sections* 76 *and* 79.—*Possession.*—*Title.*

Where money is paid into Court under Section 76 *of the Lands Clauses Consolidation Act, in respect of land taken for a purpose authorized by a special Act, the person in possession as owner is entitled to the receipt of the money so paid in, unless it be shown that such person is not the owner in fee-simple, the onus of proof of that fact being in the party resisting the payment out of Court to such person.*

THIS was an application for the payment of moneys out of Court. The petition stated that William Le Gallez was the owner and in actual possession of a piece of land containing four acres, being Allotment No. 59 of Section 379, situate at Tam O'Shanter Belt, in the Hundred of Yatala, at the date when it was taken possession of by the Commissioner of Sewers. The Commissioner, however, was dissatisfied with the petitioner's title to his piece of land, and on October 13, 1880, in pursuance of the provisions of the Lands Clauses Consolidation Act, paid the sum of £160 into the Bank of South Australia, to be placed in the name of the Master of the Court to the credit of the petitioner or other parties (if any) interested in the piece of land in question. The petitioner, therefore, asked that the said sum of £160 might be ordered to be paid to him, and that the Commissioner of Sewers might be ordered to pay the costs of and incidental to the taking of the said land, and also of the present application for payment of the money out of Court. Affidavits were put in of William Le Gallez, John Mackie, and Richard Day in support of the petitioner's claim. The affidavit of Le Gallez showed that he had purchased the land in question from one John Quayle, in December, 1871, who had, however, only a title by possession to it. The assessment-books for the District of Yatala showed that from 1860 up to 1872 John Quayle was assessed as owner of the land, and since

that date up to the present time the petitioner had been assessed as owner. The petitioner further swore that he was not aware of any right in any other person than himself, or of any claim made by any other person to any estate or interest in the land in question. The affidavit of John Mackie was to the effect that he was acquainted with John Quayle in 1854, and that he was at that time in actual possession of the land in question, and remained so in possession until about 1871, when the petitioner, Le Gallez, took possession of the land. The affidavit of Richard Day was substantially to the same effect.

Nesbit for the petitioner cited.

Exparte Chamberlain, L.R., 14 Ex. D. 323.

Kingston for the Commissioner of Sewers. The affidavits should show more clearly that Quayle's possession of the land was as owner. [BOUCAUT, J.—The rule of law is that possession is *prima facie* evidence of a title in fee-simple.] He might have been the holder of the land as a tenant only. [BOUCAUT, J.—It is quite clear from Section 79 of Act 6 of 1847 that the person in possession shall be deemed to be the owner of the land.] No documentary evidence whatever is produced to show that he was in possession of the land as owner. [BOUCAUT, J.—It is not necessary, according to Clause 79, but as a matter of fact he says in his affidavit that he was in possession as owner.] The clause merely means that possession is *prima facie* evidence of title.

Cur. adv. vult.

May 25, 1881.—

BOUCAUT, J. —I am satisfied that the petitioner is entitled to an order for payment to him of the money in Court. The affidavits show that the petitioner was, at the time of the taking of the land, in possession of the same as owner. Under these circumstances he is, according to Section 79 of the Crown Lands Consolidation Act, to be deemed to be the owner, unless the contrary be shown, and here there is no evidence to the contrary.

Order accordingly, with costs.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [COMMON LAW.

30 MAY AND 1 JUNE, 1881.

IN THE MATTER OF SAMUEL DE YOUNG, AN IMPRISONED INSOLVENT.

INSOLVENT ACT, 1860, *Section* 123.—*Adjournment* sine die—*Neglecting or refusing to make available—Suspicion—Evidence.*

The "lands, tenements, &c.," referred to in Section 123 *of the Insolvent Act*, 1860, *comprise lands, &c., which pass to the Assignees by virtue of the adjudication, and not merely to lands outside the jurisdiction of the Province.*

Where the evidence of the Insolvent is in itself improbable, and rendered untrustworthy, from surrounding circumstances, and intrinsically, the Court is justified in disbelieving such evidence, though not directly contradicted, and in suspecting, contrary to such evidence, that the insolvent has property which he has neglected or refused to render available, and to adjourn his hearing sine die *in consequence of such suspicion.*

Quære—*Whether the Court of Insolvency has power to order an Insolvent to make a conveyance to the Assignees of land outside the jurisdiction of the Province.*

THIS was an appeal from the decision of the Commissoner of Insolvency adjourning insolvent's hearing *sine die.* The Insolvent, having been previously carrying on business in Melbourne, in partnership with his father and other relatives, dissolved the partnership in 1878, and began business in this Colony, with a capital of about £500, still continuing the Melbourne business on his own account. During the eight months preceding his insolvency his liabilities increased by £11,000, his assets being only £770. Many cheques drawn by him for tallow and other goods, were used to take up bills, and he accounted for about £8,000 of his deficiency by stating that he had shortly before his insolvency paid that to the Melbourne firm, which at the time of his insolvency had no assets. There were other suspicious circumstances connected with the insolvent's transactions which sufficiently appear from the arguments and judgments.

Mann, Q.C., for the Insolvent. The powers of the Court in the present case will be confined to confirming or reversing the decision

of the Commissioner. By Section 121 of the Act of 1860 the Court is to examine insolvent as to his schedule and dealings. By Section 122 the Court is to award certificates after such examination, and by 123 the Court, when the certificate could be awarded, may adjourn the final hearing *sine die*. The Act provides penalties for all possible offences, and the maximum penalty is three years' imprisonment. Under the 123rd Section of the Act the insolvent must not only have the assets, but must neglect or refuse to make them available. There was no proof that he had them. The Commissioner, in delivering judgment in the Court below, had very properly laid it down that if it were a question arising solely in connection with the penal clauses of the Act there would be little doubt, according to the decisions of the Superior Courts in England, that the charges must be proved with the same precision and clearness that would be necessary in the case of a criminal prosecution in a Criminal Court; and no doubt the Legislature, in introducing the *sine die* clause into our Insolvent Act, had recognised the difficulties of proving many of these cases under the penal clauses, and had seen the absolute necessity there was of preventing insolvents passing through the Court unless the Court was satisfied that they had not neglected or refused to make any portion of their property available for distribution amongst their creditors. It must be borne in mind that the words of the *sine die* clause are not that it must be proved that the insolvent has made the neglect or refusal. The words are if he has or the Court "suspected" that he has done so. The Commissioner went on to say that he had on many occasions expressed an opinion that when an insolvent in his final examination disclosed, in accounting for what had become of his property, transactions which might be highly fraudulent in themselves, yet, if the Court was satisfied that the destination alleged as that to which the money had gone was the true destination, in that case the insolvent would not come within the *sine die* clause. The Commissioner, however, then said something to which I must object, namely, that the question as to whether the insolvent had property which he refused to make available depended entirely upon what weight must be attached to the insolvent's own evidence. If his statements throughout the examination were true, or were what a Jury or any reasonable or

intelligent person would be satisfied with, and say that they were true, why then he did not think it would be a case in which the insolvent's meeting should be adjourned *sine die*, however unsatisfactory his conduct might have been in respect of his dealings. Through the whole of the Commissioner's judgment ran the idea that the money said to have been sent to the Melbourne firm had not been so sent, but was still in the possession of the insolvent, and was not accounted for, and, therefore, the case was adjourned *sine die*. This is using the clause as a punishment for the debtor; and at a time when imprisonment for debt has been abolished, and when the maximum term of punishment for withholding assets is three years' imprisonment, it is out of the question that a man should be imprisoned for life simply because the Commissioner of Insolvency suspects that he has property that he has not made available. [WAY, C.J.—The suspicion of the Court must be suspicion founded upon evidence.] There must be some substantial ground for believing that the property was under the insolvent's control apart from the evidence given by him. For non-disclosure of his effects the Court could have awarded him a third-class certificate. The only reason I can give for Section 123 is that it refers to something not provided for in the other clauses of the Act, and that the property which the insolvent neglects or refuses to make available must be property which does not pass to the assignees by the adjudication; and, assuming that to be correct, the only possible property to which it could refer is land situated in another country, inasmuch as all land within the province and personal property, wherever situate, vested in the assignees immediately on the adjudication. [BOUCAUT, J.—In Aylwin's case it was decided by the Supreme Court, by the late Chief Justice HANSON and his colleagues, that it was improper for the Commissioner of Insolvency to withhold a certificate from the insolvent on the ground that he refused to make available land outside the Colony, inasmuch as the royal assent has been withheld from the Insolvent Act of 1857-8 containing that provision, on the ground that it provided that land outside the Colony should pass to the assignees, and that this provision was contrary to international law.] The insolvent having given an account on oath of the money and property which had passed through his hands, that statement

must be accepted as correct, unless evidence were called to disprove it. Even if the insolvent, within a few days of his insolvency, had handed over to a third person a large sum, on the understanding that it was to be returned to him when he should have passed through the Court, the clause would not apply, inasmuch as such property would not be within the control of the insolvent. He could not enforce payment, though the assignees could. Storey's "Conflict of Law" supports the proposition that there are cases where the Court has power to refuse a release to an insolvent while he has property in another Colony which he has not made available to creditors; and *ex parte* Lewis shows that the object of the *sine die* clause in the English law was not to punish insolvent, but to bring about a full disclosure of his effects.

Downer, Q.C., and *Bray* for the assignees. The Insolvent Act is remedial, not penal; and the Court, in return for a benefit being given, requires that the insolvent should make all his property available to his creditors. In the case of

Ex parte Quinn, *re* Quinn, 10 L.T., N.S., 705.

Under the English *sine die* clause, Lord WESTBURY, speaking of such a case as this, said, a man might have had £500 in his possession on Saturday night and might have got drunk and lost it before Monday, without knowing how or when. That was perfectly possible, but no Commissioner could accept such an explanation. Therefore he was right in adjourning the case *sine die*. Both non-disclosure and concealment are dealt with by the Act, but this clause has to be put in force before the time comes for putting them into force. It can be used either penally or as a penitential measure. Out of kindness the Commissoner could say, "I will not put you in prison for three years, but will adjourn the case and withdraw my protection, and you will have an opportunity, when you can explain where your effects are, of regaining your liberty." And what should be done in that case is to apply to the Commissioner of Insolvency for a re-hearing. The insolvent has the case in his own hands. The suspicion of the Court was a suspicion based on evidence. The insolvent stated that he had been carrying on business with his father and brothers in Melbourne, and left them

and came over here. He here set up in business with £500 worth of rags, bones, and bottles, and in twenty-two months passed £150,000 through the Bank. He made arrangements to dissolve the partnership, but according to his account, afterwards paid a sum of £8,000 in settlement of the liabilities of the firm, which at the date of the adjudication was without assets. He used accommodation bills, drew cheques for tallow, brass, &c., which were really used in payment of bets; deposited with Mr. Thompson, the bookmaker, £200 pending the result of a bet of £20 to £200, and paid Thompson a further sum of £300 in consideration of certain proposed betting transactions. Papers, including all letters from the Melbourne firm, were alleged to have been stolen, and were not forthcoming. He had drawn cheques, making them payable to names which occurred to his mind at the moment. In the cheques he referred to tallow, brass, and such things, but some of the transactions proved to be betting transactions. In June, 1879, he was asked for a balance-sheet, and had shown that his liabilities amounted to £9,424. That was intended to show everything except the Bank. His total assets were £21,423 9s., and the liabilities were between £17,000 and £18,000. But from that date up to the time of his insolvency his liabilities increased by £11,000, and his assets by only £770 14s. 11d. [WAY, C.J.—That would excite in most minds a suspicion that there had been a great leakage.] A large number of the cheques drawn as for goods, scrap iron, &c., and which the insolvent stated were for taking up bills, had been allowed by him to be included as for goods, though he was present. From June 27, 1879, till the time of the insolvency, cheques to the extent of £7,497 8s. 3d. were drawn, and it was suggested that this amount was paid to the Melbourne firm, but it was considered by the Commissioner that the money had not gone in that way. Leaving the suspicions out of the question, the insolvent's own cheques went to show that they did not go to the Melbourne firm. He said he did not know what the Melbourne firm did with the money, but it should be remembered at the same time that he was the Melbourne firm. [ANDREWS, J.—Was it proved that the money went to Melbourne?] We have only the insolvent's own evidence. [WAY, C.J.—It is impossible that a typical case could have been

presented as showing more strongly the necessity for this power of enforcing disclosure than this one. Unless there was some power of that kind, an insolvent might snap his fingers at the creditors.] [*Mann*—He could have been awarded a third-class certificate.] [WAY, C.J.—The Legislature appear to have found that the third-class certificate was not sufficient, and have provided something else.] Mr. Wright, who was storeman for the insolvent, had not appeared in the proceedings at first, but afterwards it was stated he had blank cheques left with him when De Young went to Melbourne, and then Le Messurier contradicted his former evidence, and said he had to go to Wright for cheques. In reference to the transactions mentioned in Appendix A. of the papers, the first was on a bill which was accepted by Mr. E. Wright, insolvent's storeman, who was described as getting a salary of £2 5s. per week, but doing business for himself and the insolvent, represented that this bill of £275 was taken up by several cheques. Some, however, were proved to have gone to Melbourne, though the account was at the Bank at Port Adelaide, and one had not been drawn till after the date of the bill. The insolvent said he drew the cheques for scrap-iron and other things to deceive the Bank, but the Commissioner had a right to take the case presented by the cheques or his books, as against his own evidence, and in either case he would find a large amount to account for. [WAY, C.J.—We are all of opinion that there was ample to justify the suspicion, and, in fact, to suggest the strongest probability that the insolvent had not accounted for his estate, that there was a deficiency, as had been pointed out, of £8,000, said to have gone to Melbourne. Insolvent's indebtedness had increased in the eight months prior to the insolvency by £11,000, and the assets by only £770. Taking those broad facts alone, connected with the circumstances of the case, the untruthfulness of insolvent's statements throughout, and the systematic way in which he had been acting and keeping no record of his transactions, necessarily forces our minds to the conclusion that there was money which had not been accounted for. On this point I do not think that *Mr. Downer* need trouble himself further. *Mr. Mann* may now advance any argument he has to put forward to remove the suspicion from their minds.]

Mann, Q.C.—There is no evidence that the liabilities had increased in the time specified to the extent of £11,000, £1,000 being the extent. The accounts show actual payments to the Melbourne firm. In the statement given he has not pretended to account for more than the liabilities on bills for the previous three months, and the liabilities to the Melbourne firm had arisen in June, 1878, and the money had been paid. The absolute total deficiency was £24,000. [BOUCAUT, J.—You must show that the insolvent has accounted for that in such a way as to prove to us that the Commissioner of Insolvency has been wrong in the suspicion he had.] There had been losses on various ventures amounting to £5,853 16s. 6d.; some on bills discounted, various trade expenses, money paid on freight, and expenses of business, interest, discount, and travelling expenses, amounting to £6,870 16s.; cheques unknown amounted to £180 15s.; and the remaining items included the amount of £8,742 19s. 7d., sent to the firm of De Young, of Melbourne. [BOUCAUT, J.—Do you then say that the Commissioner was wrong in his suspicion that this money never went to Melbourne?] If the Court considers the money has gone to Melbourne, the *sine die* clause would be inoperative. [WAY, C.J.—We are all agreed that if the money went to the insolvent's relatives in Melbourne, the *sine die* clause would not apply.] Even if the money went to Melbourne in pursuance of a conspiracy to defraud, and was in the hands of another person in Melbourne, the *sine die* clause would be inoperative. [WAY, C.J.—But the insolvent would not tell us where this money had gone, and was proved to be the Melbourne firm himself, having paid off his father and brothers.] When the insolvent came to South Australia he thought he was free from the firm in Melbourne, but after they had gone on drawing on him for the first two years he consulted Messrs. Dempster & Webb, and found he was liable. He consequently went to Melbourne, and, after some stormy proceedings, dissolved the partnership in December, 1878, and paid the debts, and he has given the names of a dozen people to whom he had made payments, while the notice of the dissolution of partnership had appeared in the *Argus* of January 1, 1879. A number of transactions were referred to, and in the case of £704 16s. 8d., contracted with D. & W.

Murray for goods, he had explained to them that he bought for the Melbourne firm and was not interested. [WAY, C.J.—But that seemed to be after the dissolution, and while he was himself the Melbourne firm.] [BOUCAUT, J.—I was very much influenced by the argument of *Mr. Mann* at first that this was in the nature of a case of imprisonment for life. If that had been so, the onus would have rested on *Mr. Downer* to prove that the suspicion was correct, but as it was only a case of adjournment it lay with the insolvent to prove that the suspicion was wrong.] Suppose there were some mild possibility that the suspicion was unfounded—in that case the insolvent is in prison for life. [BOUCAUT, J.—That might have been said in the case of Quinn.] That is a very different case, as the Court under the English Act has power to adjourn the hearing *sine die* without giving any reason, and the insolvent can be admitted to bail. [BOUCAUT, J.—Time is a most material element in the case, as the Commissioner, after the insolvent has been imprisoned for a time, if he continues to give the same account, or urges that he can give no other account, might change his views and think he must have given the true version.] [WAY, C.J.—If he shows where the money or property is he would get his certificate whether it was available or not.] He has said it went to Melbourne. [WAY, C.J.—But he has made no statement as to its whereabouts. Where does he show the Melbourne firm was not his firm? Where are the assets of the Melbourne firm shown?] They had no assets. [WAY, C.J.—Then according to your own showing, there was a business in Melbourne, which had been fed to the extent of £8,000, and there was nothing to represent it.]

Downer, Q.C.—The section which has been acted upon follows the English Act, as interpreted by the Judges through several years. The Legislature has even gone further than the English Act, for it has not only said in this clause that the Commissioner should have the power of adjournment, but that it should be exercised in such cases as the English Judges on the English Act had decided that it should be used. The debtor had something to do to make his property available to his assignees—he had to say where he had put it. If he said, "I have £10,000, but I will not

tell you where it is" a third-class certificate would enable him to get hold of the money and leave the country.

Mann, Q.C.—He would be committed to goal for not answering the questions as to where he had the property.

BOUCAUT, J.—That is what the Commissioner appears to have done. As to the insolvent being in prison, in an old case, that of Kelly, on an appeal the Supreme Court decided that, by his meeting being adjourned *sine die*, he was properly in the custody of his assignees as judgment creditors.

WAY, C.J.—In this case it is unnecessary for us to express an opinion whether Clause 123 of the Insolvent Act enables the Court to procure the conveyance or assignment of property which would not pass by adjudication. We have simply to decide if that section authorizes the Commissioner of Insolvency to adjourn the hearing of the insolvent's case if he has or is suspected to have property which he refuses to make available for distribution amongst his creditors. *Mr. Mann* argued with considerable ingenuity that the operation of that section must be limited to property which did not pass by the adjudication. It appears to me that that argument is met by the other sections of the Act, and that the property which passes to the assignees is always referred to as the property of the insolvent; and it appears to me that the last argument which *Mr. Downer* addressed to the Court is conclusive with respect to the construction of the section. He has pointed out that this section is founded on the English Bankruptcy Act of 1849, which has been held by the Court of Bankruptcy in England and the Court of Appeal as authorizing the adjournment *sine die* of cases like the present. This section, as *Mr. Downer* points out, has greatly defined the cases in which adjournment *sine die* can be granted in accordance with the English decisions. And it appears to me that we should be setting aside the plain meaning of the Act, disregarding the English decisions and also the construction placed on this section of the Act for more than twenty years by the Court of Insolvency here, the general sense of the provision, and also the

decisions of this Court if we placed the limited construction upon it which we are asked to place upon it by *Mr. Mann*. It appears clear beyond doubt that the Court had jurisdiction to act in the case of the insolvent by adjourning his hearing *sine die* and the section does not appear to me to have the penal effect which the learned cousel places upon it, because it is open to the insolvent at any time to make a full disclosure of his property and obtain a discharge. With respect to the merits of the case, sufficient has fallen from the other members of the Court as well as myself during the argument to render it unnecessary for me to enter with any detail into the questions of evidence. It appears to be clear beyond a doubt that there were very strong grounds for the suspicion that the insolvent had under his power a very considerable amount of property which he neglected to make available for division amongst his creditors, and therefore the adjournment *sine die* was right.

BOUCAUT, J.—*Mr. Mann* very elaborately, and with great power, pressed upon us the view that this was in fact imprisonment for life, and I feel it incumbent upon me, regarding the importance of such a fact, to look into it. If I had agreed with him I should have required to hear at greater length the counsel for the assignees, but I did not. If it were imprisonment for life, the onus would be on the assignees to prove that the Commissioner was right; but here the onus is thrown on the insolvent of satisfying the Commissioner before he proceeds to the examination for a final certificate. The case is not, as *Mr. Mann* puts it, that the insolvent has these things concealed, but that he is suspected of having them concealed. Therefore that very subtle argument falls to the ground. It is not imprisonment for life, as the CHIEF JUSTICE puts it, as the insolvent may come to the Commissioner again. Time is a matter which is very material. The words of Lord WESTBURY show the position he is in. In Quinn's case the insolvent had £300 and lost it, and could not account for it. He makes that statement, but the Commissioner would not be bound to believe it, though it might be correct. The case is adjourned, but the man is not necessarily imprisoned for life. If the man were in gaol for six or twelve months, or two years, according to the circumstances,

and he then came up and said, "I can give no other account," the Commissioner would be bound to weigh the increasing probability of its being true, for he would have to say, "This man would not remain in gaol for such a time if he could give a better account." He might, therefore, say, "I am now disposed to believe that it is true." I now mention that I should be very indisposed to sit on this Bench and aid creditors, who are to blame for giving credit frequently, in imprisoning a man for life. But I am bound to support the English decisions upon a similar Act and the consensus of opinion of the profession. Where the late Mr. Justice WEARING says, in referring to the clause, this clause was undoubtedly given for penal purposes, I follow him. That is the way to read Lord Westbury's Act. In the case *ex parte* Lewis, Lord Justice TURNER says that "no doubt the bankrupt's examination ought to be adjourned in all cases where he has refused to make a full disclosure of his affairs. So, too, there might be cases in which the bankruptcy was giving a false account, and the Commissioner might be able to see that the bankrupt could give a better account. The question to be determined was whether it was plain that the bankrupt could give a better account if an adjournment took place." The clause really would be struck out of the Act as regards foreign property if *Mr. Mann's* construction is correct, but I do not think that is the case. So far from being satisfied that the Commissioner's judgment is wrong, I am satisfied that he was right. He may not have been right in saying that the money was in the colony. I am doubtful that it is; but he had great grounds for suspicion, and it would have been difficult to come to any other conclusion than that the insolvent had goods and chattels which he had not made available. After being in gaol for some time, perhaps at present he is able to satisfy the Commissioner of Insolvency that he can give no further account of the matter; then the Insolvency Court may deal further with it. But at present the Commissioner has a right to his suspicion, and I am not prepared to overrule him.

ANDREWS, J. — The 23rd Section of the Act is a readable and workable section, and if the Commissioner on evidence was satisfied that there were grounds for suspicion that the property

was not made available, he has a right to do what he did. It does not require me to consider whether this property was foreign or not, as the evidence shows the suspicion of the Commissioner that it was in the colony.

Appeal dismissed.

WAY, C.J., BOUCAUT, J.] [COMMON LAW.

18 JUNE, 1880, AND 27 JUNE, 1881.

IN THE MATTER OF THE APPLICATION OF J. SCHMID TO BRING LAND UNDER THE PROVISIONS OF THE REAL PROPERTY ACT, 1861, AND OF THE CAVEAT OF WILLIAM FIELD AND OF THE REAL PROPERTY ACT, 1861-1878.

REAL PROPERTY ACTS, 1861-1878.—*Caveat—Interest—Rights-of-Way.*

On caveat being lodged and petition filed by the caveator, under the provisions of the Real Property Act Amendment Act, 1878, *against the bringing of land under the provisions of the Real Property Act*, 1861, *the Court has power, by virtue of Section* 48 *of the former Act, to order the Registrar-General to enter on the Certificate of Title to be issued pursuant to such application rights-of-way over such land, to which the caveator is entitled as appurtenant to other land belonging to him.*

Quære—*Whether the person entitled to a right-of-way appurtenant has any caveating faculty.*

PETITION filed under the provisions of the Real Property Act Amendment Act, 1878, and the rules thereunder.

The petitioner was the owner of four allotments of land in Jerningham, Sussex, and Melbourne Streets, North Adelaide, and Schmid claimed title to three adjoining allotments, as to which he had made application to bring them under the provisions of the Real Property Act. The petitioner claimed a right-of-way over these three allotments from Melbourne Street to Sussex Street, and lodged a caveat against Schmid's application. He had, between the years 1844 and 1852, erected buildings, including his own business premises, on his four allotments, and in order to gain ready access to them he had made a way over the three adjoining allotments claimed by Schmid. In 1852 he fenced-in these three adjoining allotments, and in 1854 built a wall round them, providing gates in it for entrance to his premises. He used this right-of-way, and Schmid, as his tenant, used it for over 20 years. The petitioner prayed the Court to order the Lands Titles Com-

missioners to reject Schmid's application, or require its amendment by inserting a provision that the three allotments were subject to the right-of-way in question.

Belt, for the petitioner, cited

Lean v. *Maurice*, 8 S.A.L.R., 119
Gale on Easements (5th Ed.), 15.

E. J. Cox, for Schmid, the caveatee—A right-of-way is not an interest in land, and even if a certificate were granted it would not interfere with right-of-way.

Cur. adv. vult.

WAY, C.J., now delivered judgment as follows:—In this case it is admitted that John Schmid is seised in fee-simple of some allotments of land, part of Town Acre 1003, North Adelaide, subject to certain rights-of-way over the same appurtenant to the estate of William Field, the owner of adjacent land. Schmid having made an application to bring his allotment under the provisions of the Real Property Acts, without mentioning the rights-of-way to which they are subject, Field entered a caveat against Schmid's application, and has presented a petition to this Court praying that the Lands Titles Commissioners may be ordered to reject the application, or that the application may be amended by inserting therein that the allotments are subject to the rights-of-way above-mentioned, or for any other relief.

It is not disputed that Schmid is entitled to bring his land under the Real Property Acts, nor is it contended that we can order his application to be amended; but Field (whom we will call the caveator) submits that the Court can require that the certificate of title, when issued, shall set forth that the land is subject to his rights-of-way.

On behalf of the applicant it was argued that in accordance with Section 40 of the Real Property Act, 1861, and the decision of the Court in *Lean* v. *Maurice* (8 S.A.L.R., 119) the rights-of-way in question would not be affected by their omission from the certificate of

title, and that the caveator is not a person "having or claiming an interest in (the) land" within the meaning of Section 22 of the Act of 1861, and therefore does not possess (to use the words of Mr. Justice GWYNNE in *Lean* v. *Maurice*) "the caveating faculty."

With regard to the case of *Lean* v. *Maurice*, by which we are bound and with which we entirely agree, we have to remark that it is not decisive of the present controversy. It related to the effect of a certificate of title with respect to rights-of-way omitted from it, and not to the qualifications of a caveator. Under Section 22, already cited, the right to lodge a caveat forbidding the bringing of land under the Real Property Acts is limited to "any person having or claiming *an interest in the land.*" According to the high authority of Mr. Justice GWYNNE in *Lean* v. *Maurice (ubi supra)*, a right-of-way is not "an interest *in* the land." The observation was *obiter*, but it follows the language of Mr. Justice BAYLEY delivering the judgment of the Court of Queen's Bench in *Hewlins* v. *Shippam* (5 B & C, at pp. 229-233), adopted as a definition in "Gale on Easements" (5 Ed., p. 6), though qualified in "Goddard on Easements" (page 4). On the other hand, there is little doubt that a right-of-way or other easement would be held to be "an interest in or concerning land" within the meaning of the 4th Section of the statute of Frauds. (See *Smart* v. *Jones*, 15 C.B., N.S., 717; 33 L.J., C.P., 154.) The Supreme Court of Victoria, also, though setting aside a caveat to protect a right-of-way in gross, did so on the express ground that it was not (as is the present caveator's) a right-of-way appurtenant. Further, the word "interest" is used in a popular rather than a technical sense in other sections of the Real Property Acts, and in the schedules thereto.

If we turn from verbal criticism to the general scope of these enactments, the difficulty of construction is rather increased than diminished. Caveats, it may be suggested, are at least intended to protect interests which might be prejudiced if omitted from the Register-book or certificate of title. Yet, if it were held that "rights-of-way or other easements" were not such "interests in the land" as entitled the owner to enter a caveat in

respect of them, they might, if created by express grant since the passing of the Real Property Act Amendment Act of 1878 (No. 128), be altogether extinguished by omissions from the certificate of title which their owner would be powerless to prevent (see Section 60). From the other point of view it may be urged not less forcibly that the Legislature never intended to allow caveats to be entered in respect of easements, which are so various in kind, which may relate to air, to light, to water, to support, as well as to ways, which may be affirmative or negative, continuous or discontinuous, apparent or non-apparent, which when not in dispute are hard to describe, and susceptible to extinguishment, release, or abandonment, and when disputed—depending as they often do upon statutory prescription and the presumption of a lost grant—are most difficult to be ascertained, from the conflicting character of the evidence by which they are supported or opposed.

The learned counsel who appeared upon this petition do not seem to have had their attention directed to the difficulties which surround this branch of the discussion, and we should invite a reargument were we compelled to decide if the caveator has such "an interest in (the) land" as entitles him to enter a caveat. We are, however, able to leave this question open for future decision. This application, it must be observed, is not one to set the caveat aside, but is on the caveator's own petition in support of the caveat, and we think we have jurisdiction under Section 48 of the Act of 1878 to direct "such entries" upon the certificate and the register as justice requires.

Whatever may be the true construction of the Real Property Acts with respect to caveats, they seem to us to permit and even to contemplate any right-of-way or other easement to which land under the operation of these Acts may be subject being entered on the certificate of title. "The omission or misdescription of any right-of-way or other easement" from or in the certificate of title spoken of in Section 40 apparently implies that a proper description may be inserted. When an easement appurtenant is *created*, Section 42 of the Act of 1861 requires it to be registered on the grant or certificate of

title of the servient tenement. It is therefore, in our opinion, in accordance with the intention of the framers of these Acts that, though easements are protected when omitted or misdescribed (subject to the provisions of Section 60 of the Act of 1878), they should be mentioned upon the certificate of title of the land subject to them, at least when their existence is, as in this case, admitted. There is the greater need of this being done in the present instance, since the caveator's rights are supported by parol evidence only, which might not hereafter be forthcoming, and upon the effect of which, though contradictory, both parties are now agreed. It might also mislead a subsequent purchaser of land subject to so important an easement if a certificate of title were issued without mentioning it. The order will therefore be that the applicant's certificate of title is to show that it is subject to the rights-of-way appurtenant to the caveator's land stated in his petition. Having regard to the difficulties of the case, there will be no direction as to costs.

We may point out that our decision does not conflict with the judgment of this Court in *Formby and another* v. *The Corporation of the City of Adelaide*, 14 S.A.L.R., 144, or of the Supreme Court of Victoria in *ex parte Cunningham* (3 Victorian L.R. Cases at Law, page 199), in which both Courts held in effect that easements over land not under the Real Property Acts in this colony, or "The Transfer of Land Statute of Victoria," are not the subjects of registration under those Acts. The foregoing is the judgment of Mr. Justice BOUCAUT and myself. Our late colleague, Mr. Justice GWYNNE, heard the argument, but we were unable to arrive at a decision before his retirement from the Bench.

Order accordingly.

23, 25, 28, 29 MARCH; 1, 4, 5, 8, 11, 12, 13 APRIL; AND 27 JULY, 1881.

ROBB v. MANN.

CONTRACT — Construction — Specifications — Plans — Conditions — Waiver—Powers of Engineer of Government—Variations.

A contract entered into by the plaintiff with the defendant, who represented the Government, incorporated with itself a specification—and certain general conditions, the third of which provided that the plans and specifications should be "taken together to explain each other."

The specification contained the following :—

"*Par.* 1.—*The contract referred to herein includes the complete execution of a stone breakwater* 1,000 *feet long . . . . as hereinafter specified and shown upon the accompanying drawings.*"

"*Par.* 6.—*The breakwater shall be built of granite blocks.*"

"*Par.* 7.—*Mode of construction. The section of the breakwater is divided into seven areas (see Drawing* 2.*) The minimum weights of blocks to be used for the different areas are as follows:—Area A, twenty-ton blocks; area B, ten-ton blocks; area C, five-ton blocks; area D, three-ton blocks; area E, two-ton blocks; area F, one-ton blocks. The blocks shall be thrown in as close together as possible, and all interstices shall be filled in, as the work proceeds, with small stones. The Superintending Officer shall have power to regulate the quantity of small stones to be put in, and he shall have power to decide whether the contractor has put in a sufficient quantity of the blocks specified for each area. The contractor shall give the Superintending Officer, at any time, any assistance he may require in measuring the blocks before they are put in, or in ascertaining the state of any part of the work, free of expense. The inside slope of the breakwater under low water level shall be formed, as far as practicable, to an inclination of one to one; the outside slope shall be the natural one assumed by the material, or about one in four. The slopes above low-water shall be formed one to one by setting the blocks carefully in place, by means of cranes, &c., to the slope shown upon the drawing.*"

Amongst the general conditions above referred to were the following :—

"19. *The Treasurer reserves the right, from time to time, of requiring, by writing under his hand, the omission of any portion or portions of the work described in the specifications or the drawings . . . . . and, in any such case, the Engineer of*

Harbours and Jetties shall, by writing under his hand, determine whether any, and, if so, what deductions from the contract price shall be made in respect thereof."

"20. *No alterations or deviations whatever will be admitted or recognized under any circumstances, or be allowed or paid for by the Treasurer, unless the same shall have been ordered or directed by the Engineer of Harbours and Jetties, in writing.*"

"41. *None of the clauses or provisions of this specification, or of these conditions, or of any other part of this contract shall be varied, waived, discharged, or released, or held or deemed so to be at law or in equity, unless in the manner prescribed, or by the express consent of the Treasurer, under his hand.*"

On the drawings the breakwater was represented as consisting of granite blocks of the various sizes specified, thirty feet wide at the top, having on the inside an uniform slope of one to one, on the outside a slope of one to one from the top to low-water mark, then a horizontal terrace or "berm" twenty feet wide, and lastly a slope of one to four below low water to its termination. This slope was marked "natural slope assumed by the material."

The plaintiff proceeded to construct the breakwater under the superintendence of the Engineer of Harbours and Jetties, and with his consent wholly omitted the "berm," thus making an uniform slope on the outside from top to bottom, and, by using larger blocks than those specified, rendered the slope considerably steeper than one to four. Before the work was finished the Engineer-in-Chief, taking the place of the Engineer of Harbours and Jetties, required the plaintiff to construct the breakwater as shown by the plan, and threatened, on his refusal, to take the work out of his hands.

On action brought by the plaintiff to restrain the defendant from so doing—

Held—1.—*That the plaintiff was bound under his contract to construct the outer portion of the breakwater as shown in the plan—that is to say, with the twenty feet "berm" intervening between the slopes above and below low-water level.*

2.—*That it was not competent for the Engineer of Harbours and Jetties to waive the execution of any portion of the contract, and that, notwithstanding any act of such Engineer, the defendant was entitled to have the contract completed according to the plans and specifications.*

THIS was an action brought by Mr. John Robb against Mr. Chas. Mann, as nominal defendant, in which the plaintiff claimed an injunction, to restrain the defendant from taking out of the plaintiff's hands certain work connected with construction of the Victor Har-

bour Breakwater, and the sum of £1,401 8s. for extras. The latter part of the claim was abandoned during the progress of the case The claim was as follows :—

1. The plaintiff is a contractor residing in Adelaide, and the defendant is the Treasurer of the Province of South Australia, and is sued as the official representative of the Government of the said Province in respect of the matters hereinafter set forth.

2. On the 13th day of August, 1878, the plaintiff and the Hon. James Penn Boucaut, as the then official representative of the said Government, entered into a contract in writing for the construction of a breakwater and screw-pile pier at Port Victor, in the said Province; the specification for the said work, which was embodied with, and forms part of the said contract, contains, *inter alia*, the following clauses:—"The section of the breakwater is divided into seven areas (see Drawing 2). The blocks shall be thrown in as close together as possible, and all the interstices shall be filled in as the work proceeds, with small stones. The inside slope of breakwater, under low water level, shall be formed, as far as practicable, to an inclination of one to one; the outside slope shall be the natural one assumed by the material, or about one in four. The slopes above low-water shall be formed one to one, by setting the blocks carefully in place, by means of cranes, &c., to the slopes shown upon the drawing."

3. The Drawing No. 2, referred to in the said contract, is made to a scale, and contains a cross-section showing the slope the breakwater is to assume below low-water level, and has endorsed thereon, adjacent to the said slope, the words "natural slope assumed by the material," but the said slope, as measured by the said scale, is not the natural slope assumed by the material.

4. A large portion of the said breakwater has been constructed by the plaintiff in the following manner, that is to say: as to the portion of the outer slope above low-watermark, the plaintiff has set the material to a slope of one to one, and, as to the portion of the outer slope below low-watermark, the plaintiff has thrown in the material by cranes stationed on the breakwater, and projecting

seaward to low-watermark, and has allowed the material thrown in to assume its natural slope.

5. The defendant requires the plaintiff to construct the said outer slope to the scale measurements shown in the said Drawing No. 2, while the plaintiff contends that, by constructing the same in the manner above described, he is fulfilling the terms of the said contract.

6. During the progress of the work the engineer holding the office of Engineer of Harbours and Jetties represented to the plaintiff that he required the breakwater to be constructed in the manner in which the plaintiff had proceeded with the construction of the same, and the said engineer, from time to time, expressed his approval of the work as it progressed, and the plaintiff is now executing the said work in the manner represented and directed by the said engineer

7. In constructing the said breakwater the plaintiff, with the approval and at the desire of the said engineer, has made use of granite blocks of the weight of twenty tons each to a larger extent than the said specifications require. The use of such blocks has been to improve the construction of the said breakwater, but has had the effect of causing the same to assume a steeper slope than it would have assumed had the said blocks been of the size specified.

8. On the 29th day of October last, the defendant, acting upon a report, bearing the same date, of the present Engineer of Harbours and Jetties, gave written notice to the plaintiff, that unless he proceeded to carry on, construct, and execute the works of the said breakwater according to the said contract, specification, and drawings, and as directed by the letters of the said Engineer of Harbours and Jetties in the said report referred to, within fourteen days of the service of the said notice on the plaintiff, he (the defendant) would, under and in pursuance of the provisions contained in the conditions of the said contract either absolutely determine the said contract, or take the execution and completion of the said work out of the plaintiff's hands. The said letters require the plaintiff to commence, continue, and com-

plete the sea-slope of the said breakwater, according to the cross-section shown in the said Drawing No. 2, and the defendant contends and insists, that, under the said contract, the plaintiff is bound to construct the said slope according to the measurements shown in the said drawing, and the areas described in the said specification. It is not pretended by the defendant that the plaintiff refuses, or has failed, to carry out his said contract, except as regards the last-mentioned particular.

9. The plaintiff says that, unless restrained by the injunction of this Honorable Court, the defendant will, on the grounds in the said letter set out, take the work out of the plaintiff's hands, and the plaintiff submits and insists that the defendant has no right, at law or in equity, so to do, as the plaintiff is carrying out the works of the said breakwater in accordance with the terms of the said contract, specification, and drawings.

There was also a claim for extras, which was abandoned during the progress of the case. The defence was as follows :—

1. The defendant admits the statements contained in the 1st, 2nd, 3rd, 4th, and 8th paragraphs of the claim, save that the defendant denies the statement in paragraph 3 of the claim, that the slope of the breakwater under the low-water mark, as measured by the scale in the said 3rd paragraph referred to, is not the natural slope assumed by the material, and that the defendant denies that the cranes referred to in the 4th paragraph of the claim, as stationed on the breakwater, project seaward to low-water mark.

2. The plaintiff is constructing the said outside, or sea slope of the said breakwater at an inclination of about one to one, and has not constructed the "berm" marked in the said Drawing No. 2, and which, according to the said drawing, should extend horizontally, at level of low-water, for a space of twenty feet. The plaintiff has not filled in the blocks in outer area C in the said drawing, but has thrown in the material, consisting chiefly of granite blocks of twenty tons each, from cranes stationed on the breakwater, but

which cranes do not project far enough to reach low-water mark, or even to the inner edge of the said "berm."'

3. Clause 7 of the specification referred to in the clause contains, besides the extracts given in the second paragraph of the claim, the following words, namely "the maximum weights of blocks to be used for the different areas are as follows:—Area A, twenty-ton blocks; Area B, ten-ton blocks; Area C, five-ton blocks; Area D, three-ton blocks; Area E, two-ton blocks; Area F, one-ton blocks. The superintending officer shall have power to regulate the quantity of small stones to be put in, and shall have power to decide whether the contractor has put in a sufficient quantity of blocks specified for each area."

4. The general conditions annexed to and forming part of the specification and contract referred to in the claim contain the following conditions:—"Nos. 20 and 41," (set out in judgment).

5. The defendant denies the statements contained in paragraphs 6 and 7 of the claim, and says that even if the Engineer of Harbours and Jetties permitted any such deviation from the said speeification and drawings as alleged, that such deviation was not required or ordered in writing by the said Engineer of Harbours and Jetties, or by the Treasurer under his hand.

6. The defendant denies that the use by the plaintiff of granite blocks of twenty tons each, to a larger extent than by the said specification required, has been to improve the construction of the said breakwater, and the defendant says that the plaintiff by so using granite blocks of greater size and weight than prescribed by the said specification, and omitting to construct Area C in the said drawing, has committed a breach of his said contract.

7. The defendant requires the plaintiff to construct the outside or sea-slope of the said breakwater according to the cross-section shown in Drawing No. 42 referred to in the claim, and according to the measurements shown in the said drawings and specifications, and the areas described therein, and the terms and conditions of the contract and specification (with which is incorporated the

general conditions), and drawings referred to in the claim, and the defendant says that the plaintiff is not so constructing the said sea-slope of the said breakwater, and is therefore not fulfilling the terms and conditions of his said contract.

The remainder of the defence had reference to the claims for extras only.

The facts and arguments sufficiently appear from the pleadings and judgment.

Symon, Q.C. (Attorney-General), and *Downer, Q.C.*, for the plaintiff.

Mann, Q.C., and *Grundy* for the defendant.

27 July, 1881.

WAY, C.J., now delivered judgment as follows :—

This is an action tried before me, in which Mr. John Robb, the contractor for the harbour works at Port Victor, is plaintiff, and the Hon. Charles Mann, the late Treasurer, is nominal defendant on behalf of Her Majesty. The plaintiff claims, firstly, an injunction restraining the defendant from taking the works out of the plaintiff's hands; and secondly, a sum of £1,401 8s. for extra work to a screw-pile pier forming part of the harbour. It was admitted on the trial that the plaintiff could not support the claim for extra work, and I have therefore only to decide if he is entitled to the injunction asked for.

The dispute which has arisen is by the contract for the works left to the determination of the Engineer of Harbours and Jetties; but the provisions to that effect have, at the plaintiff's request, been waived by the Government in order that the decision of this Court may be had upon the questions in controversy.

The harbour works to be executed for the Government by the plaintiff included amongst other things, "a stone breakwater 1,000 feet long," for which the contract price is £83,295 17s. 6d. The breakwater was commenced in May, 1879, and was being

constructed without any complaint on the part of the Government until June, 1880, when Mr. Hickson, who as Engineer of Harbours and Jetties had designed and overlooked the works, retired from the Government service. Mr. Mais, the Engineer-in-Chief, was appointed to succeed Mr. Hickson as Engineer of Harbours and Jetties, and in July, after an inspection of the works, wrote to the plaintiff, complaining that the breakwater was not being carried out to its proper width, and directing that the sea-slopes should at once be constructed for the entire length of the work in progress in accordance with the contract, and that thereafter they should be completed simultaneously with the main body of the breakwater. A written correspondence followed, in which the plaintiff stated that he had been "constructing the breakwater in entire accordance with the plan and specification, and respectfully declined to alter the mode of construction." On October 29 the defendant gave the plaintiff notice that unless he complied with the requisitions of the Engineer of Harbours and Jetties the defendant would, in pursuance of powers contained in the general conditions, determine the contract, or take the work out of the plaintiff's hands.

The plaintiff seeks an injunction restraining the defendant from acting upon this notice on two grounds — First, that the breakwater is being constructed according to the contract; and secondly, that if the contract is not being followed, the Government cannot now insist upon the work being executed differently from the way in which it is being carried out.

The contract upon which the determination of the case depends incorporates with itself, besides other documents, a specification and general conditions referring to drawings. Material to this discussion are Drawings No. 1, "General Plan of Harbour Works;" and No. 2, "Sections of Breakwater;" also the following extracts from the specification :—

Par. 1. "The contract referred to herein includes the complete execution of a stone breakwater 1,000 feet long . . . . . as hereinafter specified and shown upon the accompanying drawings."

Par. 6. "The breakwater shall be built of granite blocks."

Par. 7 (headed "Mode of Construction"). "The section of the breakwater is divided into seven areas (see Drawing 2). The minimum weights of blocks to be used for the different areas are as follows:—Area A, twenty-ton blocks; area B, ten-ton blocks; area C, five-ton blocks; area D, three-ton blocks; area E, two-ton blocks; area F, one-ton blocks. The blocks shall be thrown in as close together as possible, and all interstices shall be filled in as the work proceeds with small stones. The superintending officer shall have power to regulate the quantity of small stones to be put in, and he shall have power to decide as to whether the contractor has put in a sufficient quantity of the blocks specified for each area. The contractor shall give the superintending officer at any time any assistance he may require in measuring the blocks before they are put in, or in ascertaining the state of any part of the work free of expense. *The inside slope of the breakwater under low-water level shall be formed, as far as practicable, to an inclination of one to one; the outside slope shall be the natural one assumed by the material, or about one in four. The slopes above low-water shall be formed one to one by setting the blocks carefully in place by means of cranes, &c., to the slopes shown upon the drawing.*"

Neither drawings nor specification taken apart from one another describe the work intelligibly; but, according to General Condition 3, they are to be "taken together to explain each other." Looking at them in this way it is seen that the breakwater is to consist of granite blocks arranged in layers (called "areas" in the specification) of various sizes, from a minimum of one ton up to a maximum of twenty tons. On the sectional drawings the breakwater is depicted thirty feet wide at the top, with a uniform slope of one to one from top to base, on the inner side. On the outer or exposed seaward side there is a similar slope from top to low-water mark. At the foot of this slope is a flat ledge or terrace (technically called a "berm") twenty feet broad. From this berm a long slope of five-ton blocks, partially covered with twenty ton blocks stretches still further seawards. This flat ledge, or berm, and long seaward slope outside it, are altogether omitted from the

work done by the plaintiff, and are the subject of dispute between him and the Government. He asserts, and the Government denies that on the true construction of the contract neither berm nor slope outside are part of the work to be done in building the breakwater.

It is, I think, impossible for any one who examines the drawings and specifications to hear this contention of the plaintiff's for the first time without surprise, and this surprise will not be diminished on further investigation. The berm which the plaintiff says is no part of the work strikes the eye in glancing at the ground plan (No. 1) as a prominent feature stretching from one end of the breakwater to the other. It is also shown with vertical lines on each side of it, and with its width in figures above on all five of the cross sections. The slope outside the berm, which is of small size on the first of the cross sections, grows in magnitude in each successive section until in the last its foundation has a thickness of 24 feet, and a width of 125 feet, and forms more than half of the base of the whole structure. The magnitude of these omissions from the contract drawings which the plaintiff contends he is entitled to make may be better understood when it is mentioned that they amount to 55,954 cubic yards, and £24,895 in money value at the rate the plaintiff is being paid for the entire breakwater. In other words these omissions represent in quantity and in value something between a third and a fourth of the whole structure as shown on the drawings, and are equivalent to cutting off between 250 and 300 feet of the breakwater at its average width. The contract also contains a "schedule of rates upon which this tender is calculated." Apply these rates to the cubical contents ascertained from the plans without making these omissions, and the result is a much smaller sum than the contract price for the work. If turning from these calculations the objects intended to be secured by the design of the breakwater are sought after it will be seen that, by the drawings, the berm and outer slope are interposed between the open sea and the rest of the structure, apparently as a buttress against the force of the Southern Ocean. And, as if the greatest strength were needed in this exposed part of the work, the foundation of the slope is of five-ton blocks, whilst

inside it the rest of the structure is placed upon a foundation of one-ton blocks. In the work as executed, these features—the berm, and long slope beyond with its heavy foundations, protecting the breakwater against the outside waves—find no place. It may no doubt be remarked that Mr. Hickson, who designed the breakwater, says that, though shown upon the drawings, the berm and slope outside are properly omitted in carrying out the work. On the other hand he admits that, agreeing with the advice of Sir John Coode, the eminent marine engineer, to whom the original drawings were submitted, that the breakwater as at first designed required greater thickness to strengthen it, he added this increased thickness at the berm, which he widened from ten feet as it stood at first to twenty feet upon the contract drawings. This was entirely useless if the berm is to be left out of the work.

The elaborate arguments presented in support of the plaintiff's construction of the contract may be summarized as follows:— "In the penultimate sentence of clause 7 of the specifications 'the outside slope,' which is to 'be the natural one assumed by the material, or about one in four,' includes the whole face of the work next the sea, except the slope above low-water; beginning therefore at the inside edge of the berm, shown upon the drawing, it takes in both berm and slope beyond. On any other construction the specification fails to describe the whole of the seaward face of the work. 'The natural (slope) assumed by the material' is the ruling description of this 'outside slope'—the words or 'about 1 in 4' being added as an estimate of the inclination the slope would probably assume. The meaning of 'natural (slope) assumed by the material' is the slope obtained by throwing or tipping the blocks of stone outwards from the edge of the top of the breakwater after the fashion of constructing a railway embankment. The slope the materials will assume depends upon their weight and consequent resistance to the force of the waves. Light materials will assume a long slope, and heavy materials a steep one. Therefore, as the specification only prescribes the minimum sizes of the blocks and leaves the contractor at liberty to use blocks as much heavier as he pleases, he really has the power of determining the inclination

of "the outside slope." As a fact the materials tipped or thrown on the outer face of the breakwater assume a steeper slope than shown upon the drawings, so much steeper that it cuts off the berm and Area C—the outside slope beyond. The work as described no doubt conflicts with the drawings, but is in accordance with the specification which overrides them. Besides, the drawings contradict each other. The admeasurements in the cross-sections show a greater width at the base of the breakwater than the base scales on the ground plans. Granted that the drawings depict a berm, such a thing is not mentioned in the specifications, which is another reason for rejecting it. This, too, is a *pierre-perdue* breakwater. The shape such a breakwater will finally assume is always uncertain. The intention therefore of the drawings at least on the outside face of the work below low-water was to show the inclination the materials would probably assume, and not to bind either as to quantity or shape. It turns out that the unexpected steepness of the natural slope occasions a great saving of materials. This the contractor is entitled to the benefit of, as the loss would have been his if the slope had been flatter and required more materials than shown upon the drawing."

With respect to these arguments it may be observed that the designation of the breakwater as one of the *pierre-perdue* class occurs in no part of the contract. Three slopes and the level or plane at the top are admittedly fixed by the drawings or specification. The provision of a berm only adds a fifth line to the fixed contour of the breakwater, and if *pierre perdue* is an inapt name for such a structure another may be found for it. There is nothing upon the drawings or in the specification to show that the lines upon the former, representing the outer face of the work, are only speculative and not determinate ones. On the contrary, as already pointed out, the berm and slope beyond it are shown on the drawings as distinct features, marked off from each other and the rest of the structure in a way inconsistent with an imaginary representation of the inclination the materials may possibly assume. It is difficult also to understand the use of the drawings if they indicate neither the shape of the breakwater nor the quantity of materials to be used. The variance in width of the base as scaled

upon drawing No. 1, and as shown in figures on the cross-sections, is merely a difference between a general ground plan and working drawings, and is anticipated and answered in Clause 2 of the specification. "The figures upon the drawings are to be taken in every case, except where there is an obvious clerical error, and the scale is only to be used where there are no dimensions given." (See also general condition No. 3.) The specification only explains the drawings, and does not affect to describe every line in the profile of the work. If it fails to mention the berm twenty feet in width, so, also, it says nothing about the level, thirty feet wide, forming the top of the breakwater. The argument for omitting the berm because it is not named in the specification, is equally strong for leaving out the level at the top and carrying up the breakwater to a ridge or angle like a gable roof. Further, there is nothing either in the specification or the conditions requiring the "natural slope" to be obtained by tipping or rolling the materials from the top down the side of the work. As a fact, a part of the outer slope has not been attained in that manner, but has been formed by barge-tipping, extending forty feet further seaward than the top of the breakwater. It is also obvious that if the berm were constructed at low-water it would intercept the stone tipped or rolled over the slope above it from the top of the breakwater, and that the blocks accumulating there would fill up and obliterate the berm and part at least of the slope above. The theory, therefore, of a natural slope being necessarily obtained below low-water by throwing or tipping the materials from the top of the breakwater is destroyed if the berm is an essential part of the design.

It follows that the first branch of the plaintiff's case depends on the interpretation which he places upon the words "outside slope" in the last sentence but one of Clause 7 of the specifications, and his thereby getting rid of the berm as an essential feature of the breakwater. If his interpretation is right, the contract drawings and the specifications undoubtedly conflict. If it is wrong, there is no repugnance between them, and no pretence that the berm and slope seaward of it are not required by the contract. As before stated, the plaintiff interprets the "outside slope" which is to "be the natural one assumed by the material, or about one in

four," to mean the whole face of the work next the sea, except the slope to "be formed one to one" above low-water. "Strike out the last sentence of the paragraph," says his learned counsel *(Mr. Downer)*, "and the necessary meaning of 'outside slope' is the whole seaward face of the work. Insert the sentence again, and it operates as a proviso limiting the description of outside slope to the whole seaward face of the work below low-water mark, and there is no room for a berm or anything else at low-water." The answer to this argument is that both sentences are there, and a reasonable construction must be placed upon each of them as it stands. The second describes "the slopes above low-water;" the first, the slopes below. There is nothing in either to exclude the berm, which is neither above nor below, but *at* low-water level. The words "outside slope" in the first of these two sentences are elliptical. "Outside slope" of what? We find an answer in the first part of the sentence which speaks of "the inside slope of breakwater under low-water level." The ellipsis after "outside slope" must then be supplied either with the words "of breakwater," or with the words "of breakwater under low-water level." If in the second manner, *cadit quaestio.* If in the first—the cross sections show two slopes on the outer face of the work, and the slope *under* low-water level is "the outside slope."

If any difficulty remain as to the meaning of these words it is solved by the first sentence of the same paragraph of the specification—"The section of the breakwater is divided into seven areas." And so it is, if the meaning I place upon the words "outer slope" is correct. If the plaintiff is right, one of the areas is omitted, and there remain only six.

A further confirmation of this interpretation to be found on the drawings is still to be noticed. Above each of the cross sections there is a horizontal line, from which vertical lines descend to the ends of each level and slope. On cross section 4, above the outside slope below low-water mark, midway between the vertical lines at its extremities, are written the words "natural slope assumed by the material," thus identifying this slope on the drawing with the same slope on the specification according to the

meaning, which in opposition to the plaintiff's view, I have been compelled to adopt. Taking the drawings and specifications "together to explain each other," I find no conflict between them nor any pretext on a fair construction of the contract for leaving out the berm and outside slope in the execution of the work.

In this view of the case it is probably unnecessary now to decide one point which was warmly debated at the trial, namely, the meaning of the description of the outside slope as being "the natural one assumed by the material, or about one in four." Some of the witnesses for the defence reject the words "the natural slope assumed by the material;" the plaintiff rejects the words "about one in four." It appears to me that neither expression can be disregarded. I agree with *Mr. Downer* that the latter words are appreciative of the former. As previously stated, I disagree with the argument that "the natural slope" is necessarily to be obtained by tipping the material from the outer edge of the top of the breakwater. The contractor seems to me at liberty to "throw" in his material in the manner, and with the appliances—barges, cranes, staging, or anything else—he finds most convenient. The outer end of the base of this "outside slope," and the point to which the slope is to be carried—the outer edge of the berm—are both shown upon the drawings. The material has to be thrown in to form a slope between these points. The inclination of a line drawn between them may not be exactly, but is approximately "*about* one in four." Mr. Chamier was, I think, wrong in not allowing, in his estimate of the slope, for the thickness of the material at its outer extremity. If the action of the waves displaces the material so as to form a different profile to that represented upon the cross sections, it will, as the "natural slope assumed by the material," answer the language of the specification.

A good deal was said at the trial with respect to the difficulty and expense of constructing the work in accordance with the drawings and specification. The evidence showed that it could not be executed in certain specific ways, or with particular appliances; but none of the witnesses stated, nor indeed is it alleged in the pleadings, that it is impracticable.

For his own convenience in carrying out his contract the plaintiff is making the breakwater 4 feet wider and 18 inches higher than required by the drawings. The slopes above low-water mark have also for the same reason been made a little less abrupt than specified. The extra quantity of the stone used in this way will amount on the whole breakwater to 21,304 cubic yards, and in value at the rate paid for the completed work to £9,911. If the plaintiff were allowed this amount it would reduce the sum he saves by omitting the berm and slope beyond to £14,984. The Government is not liable for these additions, as they were not ordered by the engineer. It is also said that as the extra width is added inside the breakwater, it is not where it would be of use in strengthening the work.

There was also much debate with respect to the relative merits of a breakwater, constructed as the plaintiff is building it, or in the manner required by the contract. The evidence in aid of this discussion might have been of value if the structure were still to be designed, but had little relevancy to the investigation of what the plaintiff had contracted to build. It is undoubtedly a remarkable circumstance—as to the occurrence of which I express no opinion—if a breakwater, the form of which has been varied from the original design on no scientific principle, but simply to save labour and material, should turn out better adapted for its purpose than the structure which it has superseded, though that structure would be of greater magnitude, was designed by a skilled specialist in marine engineering, and was approved of by one of the greatest living authorities on that subject.

With respect to the plaintiff's second ground for claiming an injunction—that he has been excused from constructing the breakwater according to the contract—it is by no means clear that this can be set up in the present action. One of the terms of the agreement waiving the conditions for referring all disputes to the decision of the Engineer of Harbours and Jetties was as follows :—

"In the event of the Supreme Court deciding that the interpretation put upon clauses 7 and 21 of the specifications by the

nominal defendant is correct, Mr. Robb is to carry out his contract in accordance with the requirements of the Engineer of Harbours and Jetties."

Passing over this preliminary difficulty, and assuming that the plaintiff is entitled to come to the Court for relief, independently and in disregard of the agreement just referred to, I proceed to examine this branch of the plaintiff's case upon the merits. It is set up in paragraphs 6 and 7 of the claim.

Paragraph 7 alleges that the plaintiff, "with the approval and at the desire of the engineer," used granite blocks of the weight of 20 tons each to a larger extent than required by the specification, with the effect of thereby causing the breakwater to assume a steeper slope. This allegation may be dismissed from further notice, as the material part of it—"the desire of the engineer"—was not borne out by the evidence. On this point the plaintiff said "he (Mr. Hickson) asked me to do nothing in relation to the size of blocks." "On one occasion," says Mr. Stranger, the plaintiff's superintendent of works, "at the commencement of the breakwater we were rather short of twenty-ton blocks, and he (Mr. Hickson) ordered me to put in more of the twenty-ton blocks" (presumably because too few were being used to comply with the specification). "I gave him" (the plaintiff), says Mr. Hickson, "in the form of advice, not of directions. I told him it would be better for the breakwater, and also for himself, to put in the greatest number of large blocks he could get."

In paragraph 6 of the claim the plaintiff's case is put in two ways—1st, that "during the progress of the work the engineer holding the office of Engineer of Harbours and Jetties represented to the plaintiff that he required the breakwater to be constructed in the manner in which the plaintiff had proceeded with the construction of the same;" and secondly, that "the said engineer from time to time expressed his approval of the work as it progressed."

On these points the evidence is that the plaintiff, before

beginning the work, asked Mr. Hickson how he proposed to construct the breakwater if, as had once been intended, he had carried out the work himself; that Mr. Hickson stated that he would have constructed it substantially in the mode which the plaintiff has adopted; that as the work proceeded Mr. Hickson gave no directions to vary it, made no complaints, expressed himself satisfied with the way it was being carried out, and from time to time certified for progress payments. Whilst Mr. Hickson was still engineer the plaintiff constructed 345 feet of the breakwater up to its full height, and he protests that it is unjust that he should now be called upon, at vastly enhanced cost, to add the berm and outer slope which were omitted from the work through following Mr. Hickson's advice and with his verbal approval.

This argument is apparently based upon the principle that two parties to a contract can consent, or so act as to be held to have consented, to a substituted performance of it. It assumes that Mr. Hickson and the plaintiff could arrange between themselves for any alterations in the shape and size of the breakwater. If the berm and outside slope can be left out, because the engineer advised and made no objection to it, why not any other part of the structure? If the size can be reduced by more than a quarter, why not by half or three-quarters? If nearly £25,000 worth of work may thus be saved to the contractor, why not £40,000 worth?

In this part of the plaintiff's contention the fact is overlooked that the breakwater was not Mr. Hickson's but Her Majesty's, and that Mr. Hickson was not even a party to the contract. The contracting parties were the plaintiff on the one side and the Treasurer of the colony on the other, and the contract could only be varied with the consent of both of them, or in pursuance of some provision within itself authorising its alteration. The engineer was simply an agent, and had no more power to alter the design of the work than any stranger, except with the authority of his principal, or under some discretion which the contract confided to him (*Cooper* v. *Langdon*, 9 M. & W., 60). He was agent only for the purpose of seeing that the contract was carried out, not of

advising its breach, and when acting beyond his authority was no agent at all. The advice, therefore, which he gave to the plaintiff was, as *Mr. Grundy* put it, the advice of Mr. Hickson, and not of the Engineer of Harbours and Jetties.

The object of a contract of this kind is the execution of the works to which it relates, and it contains an independent promise by the contractor to execute those works in the manner specified. The powers of oversight and control by the agents of the employer are collateral provisions, intended to secure the proper completion of the work by checks during its progress. The failure of the agents of the employer in their duties of oversight does not excuse the contractor from the performance of his part of the contract in the absence of the employer's own acquiescence.

There is no pretence that the divergence from the contract in constructing the breakwater was brought to the knowledge of the Government before Mr. Mais's inspection of the works, or that the Government gave any consent to the alterations being made. The work was being done sixty miles from Adelaide, and the part omitted was most of it to be under water. Nor is it shown that Mr. Hickson had any greater powers vested in him than were conferred by the contract.

The provisions of the contract as to alterations in the course of the work are contained in the following extracts from the general conditions :—

"19. The Treasurer reserves the right from time to time of requiring by writing under his hand the omission of any portion or portions of the work described in the specifications or the drawings . . . and in any such case the Engineer of Harbours and Jetties shall, by writing under his hand, determine whether any, and if so what, deductions from the contract price shall be made in respect thereof. . . . .

"20. . . . No alterations or deviations whatever will be admitted or recognised under any circumstances, or be allowed or paid for by the Treasurer, unless the same shall have been ordered or directed by the Engineer of Harbours and Jetties in writing. . .

"41. None of the clauses or provisions of this specification or of these conditions, or of any other part of this contract, shall be varied, waived, discharged, or released, or held or deemed so to be either in law or in equity, unless in the manner prescribed hereby or by the express consent of the Treasurer under his hand."

It may be noted in passing that under these conditions if the Treasurer had ordered the berm and outer slope to be omitted their value could have been deducted from the contract price under general condition No. 19. The plaintiff having left them out on his own authority claims to be in a better position than if the Treasurer had been consulted, and to be paid in full as if he had done the whole of the work! Whatever the discretions of the engineer with respect to minor alterations may be, I am clearly of opinion that such a substantial variation from the design as the omission of the berm and outer slope was altogether beyond the power of the engineer to authorize without the consent of the Treasurer under general conditions 19 and 41. (See *Rex* v. *Peto*, 1 Y. & J., 37.) And even if the engineer had the power to direct such an alteration any directions not in writing under general condition 20 would be nugatory.

The progress payments set up on the trial were clearly no waiver of the omissions. They were merely on account of what might ultimately become due on completion of the contract. (*Lamprell* v. *Billericay Union*, 3 Ex., 283.) Under general condition 29 they were made "on the certificate in writing of the Engineer of Harbours and Jetties," and by No. 30, "notwithstanding the giving of any certificate that any portions or the whole of the works have been satisfactorily performed, the Engineer of Harbours and Jetties may require the contractor to remove or amend at any future time, previously to the final payment on account of the construction and maintenance of the works, any work that may be found not to have been performed in accordance with the contract."

As to the hardship of which the plaintiff complains in being now called upon to make his work good at much greater cost than

if he had done it properly at first, it will be seen that within the four corners of his contract he had ample information that his mode of construction was wrong, and that Mr. Hickson's advice or expressions of approval would not be binding upon the Government. I see, therefore, no ground for the interference of this Court on the plaintiff's behalf in respect even of the portion of the breakwater constructed whilst Mr. Hickson was Engineer of Harbours and Jetties. The case as to the part constructed since Mr. Mais's appointment fails also, for the additional reason that it has been executed in disobedience to the express orders of the present Engineer of Harbours and Jetties and in disregard of the notice of the Treasurer that the work if thus proceeded with would be taken out of the plaintiff's hands.

A further consideration of this case has not altered the opinion I expressed at the trial that it is desirable that some settlement of the dispute between the plaintiff and the Government should be mutually agreed upon. I have plainly intimated that I think the plaintiff in the wrong. It was also in my opinion impossible for Mr. Mais and for the responsible Minister at the head of his department, with any regard to their duty to the public, the one to pass, and the other to accept, the work being executed as equivalent to what was required by the contract. On the other hand, everyone who inspects the breakwater, as I have had the opportunity of doing, must be impressed with the enormous difficulty of adding to the completed portion of it the features of the design omitted in its erection. The additions to other parts, though not equivalent in value or in bulk to what has been omitted, add weight and mass—both important factors of stability—to the structure. I venture therefore to express the hope that some basis of compromise may be found which, whilst disregarding neither what has been added nor what has been left out, may ensure the durableness of the completed portion of the breakwater in some less costly manner than by altering its profile to correspond with the drawings and specification. In the meantime the judgment must be for the defendant.

Judgment for defendant with costs.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [COMMON LAW.

30 JUNE AND 17 DECEMBER, 1881.

IN RE P. D. NASH, AN INSOLVENT.

INSOLVENT ACT, 1860, *Sec.* 92—*Bill of Sale—Post-nuptial settlement.*

A post-nuptial settlement is a "Bill of Sale" within the meaning of the second part of Sec. 92 *of the Insolvent Act*, 1860.

THIS was a case stated by WAY, C.J., as Commissioner of Insolvency, and was as follows :—By post-nuptial deed of settlement to which the Court is to refer, dated May 20, 1878, registered under Act 8 of 1841, and made between Patrick Drummond Nash, the insolvent, of the first part, Maria Jane Nash, his wife, of the second part, and Alfred Whittier Marshall, as trustee, of the third part, in consideration *inter alia* of a piano belonging to the said Maria Jane Nash being assigned to the said trustee, as expressed in the said settlement, the said Patrick Drummond Nash did assign to the said Alfred Whittier Marshall the household furniture, &c., mentioned in the said deed upon trust for her the said Maria Jane Nash for her life, and after her death upon further trusts as therein mentioned. The said furniture, piano, &c., were always in the joint possession of the said Patrick Drummond Nash and the said Maria Jane Nash, the trustee never having taken possession of or interfered in any way with the same. The assignees of the estate of the said Patrick Drummond Nash took possession of the said piano, furniture, &c., in the insolvent's house, and held the same until upon application of the said Maria Nash, I, Samuel James WAY, Chief Justice and Commissioner of Insolvency, made an order that the same were to be delivered up to her, and this special case was granted to the assignees. The opinion of the Supreme Court is desired upon the following point:—"Is the deed of settlement null and void under Section 92 of the Insolvent Act of 1860?"

Symon, Q.C., for the Assignees.—This post-nuptial settlement is nothing more than a bill of sale, the definition of a bill of sale

being given in Wharton's "Law Lexicon" as a deed assigning personal chattels.

Fowler v. *Foster*, 5 Jur. N.S. 99 ; 28 L.J., Q.B. 210.

The definition clause in the English Bills of Sale Act, and the Registration Act of 1841 support the same view. This settlement, therefore, being a bill of sale comes under the latter part of Section 92 of the Insolvent Act. The words "every bill of sale" in that portion of the clause must be taken as complete in themselves, and do not refer to the kind of bill of sale, viz., for securing a sum of money, mentioned in the first portion of the clause.

Nesbit, for Mrs. Nash.—The words "every bill of sale" in the earlier part of Section 92 must be taken to refer to the kind of bill of sale mentioned in the earlier portion of the clause. The latter part cannot be read by itself or it would simply be nonsense. Some words would have to be supplied to make sense of it. The words ostensible possession must be taken to be not a possession strictly according to the title, as in the present case.

Simmons v. *Edwards*, 16 M. & W., 838,
Joy v. *Campbell*, 1 Sch & Lef., 366.

Symon, Q.C., in reply.

Cur. ad. vult.

17 December, 1881.

Judgment herein was now delivered as follows :—

WAY, C.J.—This was a special case reserved by me as Commissioner of Insolvency. The insolvent had made a post-nuptial settlement in favour of his wife, and the goods comprised in that settlement were seized by the Assignees in insolvency. I directed, on *Mr. Nesbit's* application, that the goods should be restored and handed over, subject to the case stated for the opinion of this Court.

The case depends upon the construction to be placed upon the second branch of Section 92 of the Insolvent Act, 1860. The first branch of the section provides, *inter alia*, that every bill of sale for securing sums of money given by an insolvent within three months of the filing of a petition for adjudication of insolvency, by or against such insolvent, the insolvent at the time of giving the same being unable to meet his engagements with his creditors, shall be void; and the second branch of the same section provides that every bill of sale, whenever given, so far as regards any goods of which the insolvent shall, at the date of committing the act of insolvency, be in ostensible possession shall be null and void, whether given in contemplation of insolvency or not. The first question is—Is this a bill of sale? It is an assignment of personal chattels and the case of *Fowler* v. *Foster*, 5 Jur. N.S. 99; 28 L.J, Q.B. 210, cited by *Mr. Symon*, establishes that this is a proper designation of such an instrument. The Legislature since, in the Act passed last session, has also included such an instrument as this under the definition of a bill of sale, although excluding a marriage settlement from the operation of such a definition. Then the real question in the case is—Is this within the meaning of "every bill of sale" in the second branch of the section. It was suggested by *Mr. Nesbit* that the expression is elliptical. Grammatically it is not, but undoubtedly it is elliptical if we look at the substance of what the Legislature intended. It must be qualified in some manner, but *Mr. Nesbit* says that the proper construction is that the ellipsis in this branch of the clause is to be filled up by repeating the qualification of the bill of sale of the first part of the section and reading the second branch in this way:—"Every bill of sale for securing a sum of money given by any insolvent, whenever given." But, as I have pointed out, it is not necessary, grammatically, to fill up any ellipsis at all, and, for the purpose of ascertaining the meaning of the Legislature, it is not necessary to go outside the second branch of the clause, because, lower down in the section, a reference is made to this particular class of bill of sale by the words "whether the same shall have been given by such insolvent in contemplation of insolvency or not." Therefore the second branch of the clause interprets itself as meaning a bill of sale given by an insolvent.

Grammatically it is not necessary to insert any words, and, in order to place a sensible construction upon this branch of the section, it is not necessory to insert any other words than are found within its four corners. The first thing that struck me with reference to the interpretation which *Mr. Nesbit* suggested was, that, if the Legislature had intended the words "bill of sale" to have the meaning he attaches to them, it would have been easy to use the words "every such bill of sale." In addition to this the Legislature has used the word "every," and the effect of inserting the words which *Mr. Nesbit* contends should be inserted would be, that the bill of sale—the post-nuptial voluntary settlement—would be in a better position than a bill of sale given for valuable consideration advanced at the time of such bill of sale being made. Although the ingenuity and ability of *Mr. Nesbit's* arguments led me, as Commissioner of Insolvency, to a conclusion opposed to that generally accepted by the profession ever since the passing of the Insolvent Act of 1858, in which this section first occurred, for it is not a copy of any Imperial Act, the further assistance which the Court has received from *Mr. Symon*, as well as from *Mr. Nesbit*, upon the case in this Court, has satisfied me that the generally accepted construction of the clause is right, and the construction I was led to place upon it in the Court below was wrong. Therefore the case will have to be answered in favour of the assignees. No doubt it is a hard case upon the insolvent, because, if his adjudication had been postponed until after the passing of the Act of last session, these goods would not have passed to the assignees and would have been protected by the operation of Section 26. The decision of the Court, however, must depend upon the law as it existed when the dispute arose between the parties and not as the law is now. The question in this case, "is the deed null and void?" will have to be answered in the affirmative.

BOUCAUT, J.—The question is as to the meaning of the words "every bill of sale" in the second part of Section 92 of the Insolvent Act, 1860. The difficulty of putting a construction on this section is sufficiently manifest, when, as pointed out by the Chief Justice, the view which he took in the Court below, was different

from that he has since taken upon fuller and more complete argument. I confess that I have had great difficulty in coming to a conclusion upon the meaning of these words. During the argument I recognized, as it was impossible not to do, the power and weight of the arguments of *Mr. Symon*, but, after the most careful consideration I could give to it, I was disposed to adopt the view put by *Mr. Nesbit*, that "every bill of sale" in the second part meant every bill of sale of the same nature as was meant in the previous part of the section, and that the contrast between the two sorts of bills of sale was simply a contrast in time. Every bill of sale to secure a sum of money given within three months of the filing of the petition for adjudication of insolvency, and every bill of sale, within or beyond three months, is void if the insolvent has possession of the goods at the time of his committing an act of insolvency, and the contrast ends there. And I had very great doubt whether the weight of my learned colleague's opinion would have induced me to join him in holding with the construction that a marriage settlement and a transfer of goods in the ordinary course of business were intended to be void by this part of the section. I had to consider this particular section while at the bar, and saw that the difficulties connected with it were great. I am bound to give consideration to the advised opinion of my colleagues, but the matter which puts the point beyond a doubt to my mind, and renders it improper to give effect to the view I should otherwise take of this section, arises from Section 26 of the recent Act of 1881. By that section the Legislature has thought fit to indicate that the bill of sale in the principal Act, as well as in the Registration Act, was not meant to include marriage settlements, and the transfer of goods in the ordinary course of business. Therefore, according to the usual canons of construction, I am bound to conclude that the Legislature was not *inops consilii*, but has remedied what it found to be a defect in Section 92. I am not without some little doubt, but, after the clear expression of the Legislature in the above section of the Act of 1881, I am bound to come to the conclusion at which my learned colleagues have arrived.

ANDREWS, J.—It will be unnecessary for me to add anything to

what my learned colleagues have said. When *Mr. Nesbit* conceded that this deed was, in fact, a bill of sale, I came to the conclusion my colleagues have stated. I have had an opportunity of reconsidering the matter, and I do not see any necessity for altering the view I held at that time.

Symon, Q.C., asked for costs.

WAY, C.J.—The assignees will have their costs out of the estate, but no order will be made against the insolvent, as it was a case requiring a judicial decision to establish the assignees' right, and the trustees of the settlement were fairly entitled to obtain the opinion of the Court.

Case answered in the affirmative.

1 JULY, 1881.

IN THE MATTER OF THE APPLICATION OF THOMAS BODDINGTON FOR A PUBLICAN'S LICENCE, AND OF THE LICENSED VICTUALLERS' ACT, 1880.

LICENSED VICTUALLERS' ACT, 1880.—Certiorari—*Irregularity —Notice of Objection.*

A person who has given no notice of objection to the renewal of a publican's licence cannot by certiorari *or otherwise avail himself of an irregularity in the consideration of the Licensing Bench, acting under the provisions of the Licensed Victuallers' Act,* 1880, *of the objections of a person who has given such notice.*

RULE obtained on behalf of Mrs. E. D. Freeman, of Sussex, England, calling upon the Adelaide Licensing Bench, and Thomas Boddington to show cause why a writ of *certiorari* should not be issued directing the Bench, and its Clerk to bring up all proceedings, &c., in connection with the application of the said Thomas Boddington for the renewal of his licence in respect of the Shamrock Hotel; and why such proceedings should not be quashed on the ground that such Bench had no jurisdiction to grant the licence.

The licence so granted was a renewal of the licence in respect of which proceedings had been taken as reported in 14 S.A.L.R., 68.

On February 21, one Samuel Strapps gave notice to the Clerk of the Adelaide Licensing Bench, and to the applicant of his objection to the granting of such renewal, on the ground that the management of the house of the applicant was unsatisfactory, in that he had permitted the same to be frequented by bad and improper characters. On the hearing of the application on March 10, *Mr. Stuart*, as counsel for Strapps, called evidence in support of the objection, and no evidence was called by the applicant to show that the house was necessary, but one of the objector's

witnesses stated that he would not object to the house, if it were properly conducted. The Bench, at the close of the objector's evidence, adjourned the hearing of the application, until the following day, in order to obtain a special report from the police as to the house. At the adjournment the Bench stated that a special report had been received from the police. *Mr. Stuart* asked that the report should be read, or that he should have an opportunity of inspecting the same, but this the Bench refused, alleging that the same was for the information of the Bench. *Mr. Stuart* also objected that no report had been furnished by the Commissioner of Police as required by Rule 1, of Schedule V., of the Licensed Victuallers' Act, 1880. The Bench, however, without hearing further evidence, or giving *Mr. Stuart* an opportunity of inspecting the report granted the licence. No notice of objection had been given by Mrs. Freeman. On motion for the rule the following authorities were cited—

In re Boddington, 14 S.A.L.R., 68.
Reg. v. *Justices of Surrey*, L.R., 5, Q.B., 466.
Reg. v. *Overseers of Salford*, 16 Jur., 907.
Att. Gen. v. *Lord Hotham*, T. & R., 209., 3 Russ., 415.
Rex. v. *Downes*, 3 T.R., 560.

Stuart now moved that the rule be made absolute.

Downer, Q.C., (Attorney General) showed cause.

Mrs. Freeman as a stranger cannot make the application. By giving proper notice she could have objected to the renewal of the licence; but she did not take that means of being heard. Any irregularity in the procedure of the Bench as regarded the objector other than Mrs. Freeman is not open to Mrs. Freeman. Because the report of the police in the case was not shown to Mr. Strapps, an uninterested person, Mrs. Freeman, an interested person, but who did not give the proper notice of objection, wished the report to be shown to her. If no objection had been lodged against the renewal of the licence it would have had to be renewed as a matter of course. Mrs. Freeman, who could have objected, did not do so,

and therefore as a matter of course Boddington was entitled to his licence. If the contention set up by the other side—that because the previous licence was granted improperly by the Bench Boddington had to apply as if for a new house—were upheld, my learned friend could come here twenty years after a licence had been granted and say because there was some informality in the renewal some eighteen years ago the licence was null and void. It is not contended that Boddington was not entitled to his licence in 1880 if no one interposed. Some one did interpose, and he was ruled out of Court; but Mrs. Freeman now wished to take advantage of that other person's interposition.

Stuart in support of the rule. The Bench had no jurisdiction to grant the licence, because the Magistrates did not adjourn on the notice being given on the former application which rendered the former licence void, and there was an irregularity in the proceedings of the Bench in their not having a report from the Commissioner on the second application. [WAY, C.J.—Would you contend that if both parties were before the Court when the objection was made, and they both agreed not to have an adjournment, that if the Magistrates then went on to adjudicate their proceedings would be vitiated?] I do not concede that they would not be. [WAY, C.J.—In going on without the adjournment in such a case there would not be such an absence of jurisdiction as to make their proceeding void, because such proceeding would have been consented to by both sides, and it follows that the only person who could complain for want of an adjournment would be the applicant Boddington.] Firstly, the proceedings were not in accordance with the Act; they ought to have been in public, but they were withheld from the objector. [BOUCAUT, J.—You did not appear.] I appeared on behalf of Strapps, and pointed out that there was no Commissioner's report, which was absolutely necessary. The regulations require that such report should be open to the public. There was no such report at all. [WAY, C.J.—The answer to that would be that there was neglect on the part of the Commissioner, and to hold that this neglect was to vitiate a licence would in the case of a perverse Commissioner, who might be a teetotaller, possibly prevent the whole of the licences in the colony

being granted. The regulation on this subject applies to the official only.] It was pointed out at the time that there was no report. [WAY, C.J.—Unless notice of objection had been given they could not take cognizance of this, and Mrs. Freeman cannot take advantage of it, as she has not given the requisite notice.] Then the Court has not taken any evidence as to this house being necessary. [BOUCAUT, J.—If we were to uphold this ground every licence in the country would be in danger.]

WAY, C.J.—The rule must be discharged.

BOUCAUT, J.—I would have followed the judgment in previous cases; but *Mr. Stuart* is asking to be allowed to take an advantage of an objection raised by another person, and that cannot be done.

ANDREWS, J.—Concurred.

Rule discharged with costs.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [COMMON LAW.

27 AND 29 JULY, AND 17 AUGUST, 1881.

CHAMIER v. HILL & Co.

NEGLIGENCE—Coach—Overloading—Damages.

Plaintiff was a passenger by defendants' coach which overturned and caused injuries to the plaintiff.

The coach was constructed to carry eight passengers inside and eight outside. At the time of the overturning there were eight passengers inside and ten outside.

According to the driver's evidence one of the passengers had moved from the inside to the outside of the coach without his knowledge or consent.

Immediately after the accident, the driver drew up a memorandum, which he induced the passengers to sign, whereby the overturning was attributed to overloading.

The evidence showed that the coach could not travel safely with ten passengers outside and eight inside, and at the trial the Chief Justice, who was sitting without a jury, found that the accident was due to the overloading; and held that it was immaterial whether the passenger who had moved from the inside to the outside of the coach had done so with or without the driver's knowledge or consent.

Held—*on appeal—That there was no ground to disturb the verdict.*

Question of damages discussed.

APPEAL from the verdict and judgment of WAY, C.J.

The action was brought to recover £1,500, damages sustained through the overturning of defendants' coach (in which the plaintiff was a passenger), and was tried before WAY, C.J., without a jury.

The facts are fully set out in the judgment delivered at the trial, which was as follows:—

WAY, C.J.—This is an action for damages caused to the plaintiff by the overturning of defendants' coach, in which plaintiff was a passenger from Wonoka to Hallett. I agree with the learned counsel for the defence that the onus in all cases of this nature is

thrown upon the plaintiff of showing affirmative negligence. It is not necessary for me to discuss that doctrine, as there is conflicting evidence on both sides as to the cause of the accident. It was sought to be shown by the plaintiff that there was negligence in two ways: first, by the unfitness of the coach in which the plaintiff was a passenger; and secondly, by the coach being so overladen as to cause the accident. With respect to the first ground, the defendant showed by evidence which was perfectly satisfactory to my mind that this coach was of a similar pattern to coaches used by the large firm of which he is a partner upon lines of roads all over the colony, and he has satisfied me that there is no reason for imputing that the vehicle in which the plaintiff travelled was not suitable for the carriage of passengers. The great stress of the case lies in the point whether or not the coach was overloaded. The evidence on this subject is undoubtedly conflicting, but it struck me that it was fairly given on both sides. On the one hand the plaintiff and a gentleman travelling with him relate what is evidently an honest account of the accident; while on the other hand the defendants, who had in their possession a document which told very strongly in the plaintiff's favour, and which they might have suppressed, very properly and candidly produced it. The coach was shown to be constructed for the carriage of sixteen passengers—eight inside and eight outside; but as a fact, at the time the accident happened, there were eighteen passengers being carried by it. According to the defendants' account nine persons were inside and nine outside, but the plaintiff said there were ten outside and eight in the vehicle. The defendants' manager admitted that the coach would not be safe on a rough road if there were nine persons inside and nine outside. When the coach approached a part of the road where there was a siding and a curve, and a small water channel across the road, the coach overturned. There was a suggestion that the accident was occasioned by the wind, but I confess that is not a ground, which sitting as a juror, I am able to accept as the cause of such a casualty. Then it was suggested on the part of the defendants that one of the passengers got outside against the coachman's consent and knowledge. That may be; but I must hold the coach proprietor responsible if he carries a larger number of passengers

than can be comfortably accommodated inside, for the risk of one of them being uncomfortable and clambering outside against the coachman's will. It seems to me that all controversy is set at rest by the document penned directly after the time of the accident. It was dictated by the coachman, and signed by all the passengers, and it attributes the accident to overloading. I am, therefore, compelled to come to the conclusion beyond any reasonable doubt, that the accident was caused by there being too many passengers on the top of the coach, driven as it was along an unmacadamized bush road; and, therefore, the defendants are liable for the accident which has happened. As the result of the accident the plaintiff was thrown off the top of the coach, and had his arm dislocated and the socket fractured.

The question of damages in cases of this kind has been most exhaustively discussed in *Phillips* v. *the London and South-Western Railway Company* (4 Q.B.D., 406). This case has been before the Queen's Bench, the Court of Common Pleas, and the Court of Appeals on both trials. On the first occasion a verdict for £7,000 was returned by the Jury, but that was set aside as being inadequate; and on the second occasion the Jury gave a verdict for £16,000. Both the Court of Common Pleas and the Court of Appeals refused to interfere with this verdict as being extravagant, and some of the Judges expressed the opinion that, if it was amenable to criticism, it was because that the Jury had not given a sufficiently large amount. It was laid down in that case, following the ruling in several previous actions, that the Jury—and I am sitting as a Jury—was unable to give what could be called perfect damages, but must give reasonable and fair damages, and a verdict could not be reasonable and fair which did not take into consideration the pain and suffering to which the plaintiff, through the accident, was subjected, in addition to the pecuniary loss he had sustained, including the cost of the cure or attempted cure, and the probable prospective loss of income arising from the accident. In this case the plaintiff is an engineer, having a considerable practice, seemingly an extending one, and he has made a speciality of a class of business requiring a good deal of outside work, the use of the theodolite,

continual travelling over rough roads, and the mounting and descending of ladders. The plaintiff is in early middle-aged life, and with regard to his profession he is rendered a cripple. According to the surgeons, who say they hoped the plaintiff would be better than he was at the time of the trial, he will not be able to use his arm above the shoulder for any practical purposes. Although the plaintiff may take an observation with the theodolite, he will be unable to do a day's work with it. It is not likely he will be able to drive a buggy for himself. Therefore in a great many branches of his profession the plaintiff will be very seriously inconvenienced. It is further shown that the Government, from whom he was in the habit of obtaining employment, will not retain an engineer who is obliged to have the services of an assistant in taking observations. It was proved that the plaintiff held an appointment of £500 a year from Messrs. Barry, Brooks, and Fraser, contractors, which was to have continued for nine months longer than the date of the accident; but owing to the injuries the plaintiff has sustained that contract was put an end to, and he was obliged to take a modification of it, relieving him from outdoor work, at a reduced salary of £300. At the same time he candidly admitted that his income was not less than it had been, but he said also with equal confidence that the result of the accident must produce a diminution in his income arising from the disqualification for outdoor work. Under these circumstances, although I feel considerable sympathy with the defendants, who have been rendered liable for a very considerable amount in consequence of the conduct of their coachman, over whom they had no immediate control, I must do justice to the plaintiff, and I think I should fail to mete out to him the compensation to which he is entitled if I were not to go over and beyond the sum of £52 10s., the amount incurred in seeking surgical assistance, and award him in addition the sum of £700.

Symon, Q.C., for the defendants, cited—

Metropolitan Railway Company v. *Jackson*, 3 App. Cas., 193

Phillips v. *London and South-Western Railway Company*, 4 Q.B.D., 406.

Mann, Q.C., and *Pater*, for the plaintiff, cited:—

Christie v. *Griggs*, 2 Camp., 79
Readhead v. *Midland Railway Company*, L.R., 2 Q.B., 412
Browne on Carriers, 530
Israel v. *Clark*, 4 Esp., 259
Browne on Carriers, 394.

WAY, C.J.—I have listened very attentively to all that has been urged on the part of the defendants, and I should have been exceedingly glad if I could have found some reasons for showing that the judgment which I arrived at upon the original trial of the case was incorrect, because, as I stated then, I felt strong sympathy with the defendants, who carried on a very large business, apparently in a manner beneficial to the public, and this accident occurred through no immediate default of their own On the contrary, they appear to have given instructions to their employés not to overload their vehicles, and therefore it is hard that they should be held responsible for the disobedience of their orders by their employés. On the other hand, it is manifest that in point of law they must be held responsible. If it were not so, it would be sufficient for them to issue orders of that kind, and leave persons who may be injured, in consequence of negligence in the management of their vehicles, without redress. I agree with the counsel for the defendants that in all cases of negligence it is with the plaintiff to prove his case, and if he fails in showing a state of facts inconsistent with the exercise of due care he is not entitled to a verdict. I agree with him also that it is not sufficient for the plaintiff, in order to make the defendant liable, to show that negligence actually existed. It must be shown that the negligence was negligence connected with the accident. In this case it appears to me that the negligence, even if I accept the version of the defendants' witnesses, immediately connected itself with the accident. The accident was admittedly caused by the overloading of the coach. It was shown also that it was the defendants who

loaded the coach with two persons more than it was licensed to carry when used upon good roads in the neighbourhood of Adelaide, and more than it was constructed to carry under any circumstances. And, that being the case, it appears to me that the liability of the defendants is established. It appears, even accepting the driver's version of the case, that he permitted a larger number of passengers than he ought to have carried to get on his vehicle, and his employers became responsible for what subsequently happened in consequence of the wrongful act. But if I were pressed on that point, or the law as stated by me is incorrect—though I do not think it is—I should most unhesitatingly say that I accepted the plaintiff's version as the more probable one, and which I was bound to believe, as it was uncontradicted in various important particulars, and corroborated by the document drawn out at the time, and in which, if the topheaviness had been against the coachman's will, he would have stated that the passengers had got on to the top against his consent. I am, therefore, driven on both these grounds to the conclusion that the plaintiff has established affirmative negligence against the defendants, and is entitled to the judgment of the Court. With respect to damages I do not think it necessary to add anything to the observations I made in delivering judgment in the Court below. I have acted upon the decision of the Court in the celebrated case of *Phillips* v. *the London and South-Western Railway Company*. Undoubtedly, if the damages which were awarded in this case were fixed in accordance with a rule of law laying down a scale of damages, and if in that case the plaintiff was only entitled to £7,000 damages, £750 would be too much in this case. But I agree with the eminent authorities who took part in deciding the appeal that the damages in that case were inadequate. In the amount of damages I awarded I also had regard to the damages awarded by Lord Chief Justice COCKBURN in the case of *Fair* v. *London and North-Western Railway Company* (20 L.T., N.S. 326). In that case the CHIEF JUSTICE took into account the probable increased prospective income of which the plaintiff was deprived by the accident. I am driven to the conclusion that the damages I awarded were not excessive, and see no ground for reversing the judgment.

BOUCAUT, J.—The Court has to be satisfied either that the Judge who tried the case was wrong, or so nearly wrong that it would be desirable to try it again. So far, however, from being satisfied that the CHIEF JUSTICE was wrong I think the probabilities of the case are with the judgment that he has given, and I pay more attention to the probabilities than to the possibilities put by the learned counsel for the appellant. I agree with Mr. Symon that it does not follow that because the coach was overturned negligence was to be presumed, and I think that recent decisions go rather to shake the case of *Christie* v. *Griggs*. From the fact of there being a greater number in the coach than it was built to carry, a conclusion might be drawn that the greater number had caused the overturning. But I do not think it necessary to go to such an extent as that. It might have thrown the *onus* on the defendants, but it is not necessary for the plaintiff to establish that the *onus* is changed, because he has shown more—that the overloading overturned the coach. I adopt the view of the CHIEF JUSTICE that there were ten on the top, and the proprietors of the coach have said that that would be unsafe. The memorandum that was drawn up at the time of the accident was to explain the cause of the overturning of the coach. It was the wish of the driver to show that he was a skilful driver, and that, relying on his skill, and to serve his master, he had caused the overturning of the coach by carrying one or two extra passengers. And it is impossible for the Court to shut that document out of their minds when weighing the probabilities. As to the question of damages, I will say that if I had been trying the case on the same evidence I believe I should have given more damages than the CHIEF JUSTICE has. It appears to me that the plaintiff was entitled to damages for medical assistance, for loss of time, for his pain and suffering, and for the injury he will suffer in future life through not being able to carry on his business. It seems preposterous to me to say that the amount allowed is too much for the pain and suffering the man has endured and his probable loss in the future. If any one offered me an annuity equal to the united salaries of the Judges of the Court I would not go through what the plaintiff has suffered. Between the sympathy for the plaintiff and maintaining the position of coach proprietors, I must say that my sympathy is

towards the plaintiff in restraining powerful and wealthy Companies from recklessly carrying on their business. I do not wish to say that there has been recklessness on the part of the proprietors in this case. I believe the judgment of the CHIEF JUSTICE is correct in law, and the damages not excessive, and the appeal must be dismissed with costs.

ANDREWS, J.—Looking at the whole case it appears to me that it is only reasonable to believe the witnesses for the plaintiff. It appears that the defendants were starting an opposition coach. They sent up an experienced driver, and he would not be considered committing a wrong by overloading the coach. In the paper that has been signed it is admitted that the coach overturned on account of overloading at the top, and plaintiff had also remonstrated with the driver about carrying too many passengers. I do not think the damages were excessive, because, although defendants might give directions to their drivers not to overload their coaches, they seem to shut their eyes to the fact that their driver in this instance sought relief by going to his employers with a statement that he had broken their orders. I think that circumstance should be considered as affecting the damages.

Appeal dismissed with costs.

SUPREME COURT. } HALLETT AND OTHERS v. HALLETT AND OTHERS. } IN BANCO.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [IN BANCO.

29 JULY, 1881.

HALLETT AND OTHERS v. HALLETT AND OTHERS.

WILL—Construction—Income.

A testator, by his will, devised and bequeathed all his real and personal estate to trustees, upon trust, to sell and convert the same into money, and to invest the money arising from such sale and conversion, and apply the income thereof in manner specified.

The trustees were empowered to postpone the sale, and also to carry on a certain sheep station, which formed part of the estate, for such time as they should think fit, and to sell all stock in excess of the number on such sheep station at the testator's death and apply the proceeds as income.

Held—*That the profits arising from the carrying on of the sheep station were divisible as income amongst the persons entitled to the income of any investments which, had the sheep station been sold, would have been made out of the proceeds thereof.*

ACTION brought by the beneficiaries under the will of the late John Hallett for a declaration as to the true interpretation of the provisions in his will hereinafter set forth, and for payment to them of certain income to which they claimed to be entitled.

The claim set out—1. The plaintiffs reside in or near Adelaide. The defendant, Maria Hallett, resides at Norwood; Henry Thomas Morris at Anlaby; Richard Hallett at Adelaide; and Thomas Neville Wood and Clara Wood at Narracoorte. 2. On June 10, 1868, John Hallett, then of Adelaide, died, and by his last will and testament, which has been duly proved in the Court, devised and bequeathed, after certain specific bequests, the whole of his real and personal estate to the defendants, Maria Hallett, Henry Thomas Morris, and Richard Hallett, upon trust, as soon as conveniently might be after his decease, to get in, sell, and convert the same into money, with power to postpone the sale of all or any part thereof for such time as the said trustees might deem expedient, and to stand possessed of the moneys to arise from such sale and conversion into money and of all other moneys that should come into their hands under the will, upon trust, after cer-

tain payments to lay out and invest the same in the purchase of real estate in South Australia, or by way of loan on mortgage; and upon further trust to pay to the testator's wife an annuity of £550 by equal quarterly payments so long as she should continue his widow, and to pay or apply the residue of the said annual income amongst all the testator's children in equal shares and proportions during the lifetime of the testator's wife, but so, nevertheless, that the annual sum to be paid to the testator's daughter, Clara, and his son, Henry, should not be less than £50 each; and in case the residue of the said annual income were insufficient to allow to each of the testator's children the yearly sum of £50, then the said daughter, Clara, and son, Henry, were to be entitled to receive the said annual sum of £50; and the residue of the said annual income, after payment of the annuities to the testator's wife and his son and his daughter, was to be divided amongst his other children; and upon the decease of the testator's wife, the trustees were to stand possessed of all the testator's real and personal estate upon trust for all the testator's children who should then be living, share and share alike, and the issue of any deceased child or children, such issue to take the share to which the parent or parents, if living, would have been entitled to. 3. The testator by his will also empowered his trustees, if they should think fit, to carry on his sheep-farming business and operations, in which the testator and his brother, Alfred Hallett, were jointly interested, for such period, and in conjunction with his brother or otherwise, as they should think fit; or, in the event of a partition, solely on account and for the benefit of the persons entitled under the will; and further empowered the trustees to join in the sale of any surplus stock of sheep from time to time, and directed that the moneys to arise from any such sale should be deemed annual income and applied accordingly, and that surplus stock should be deemed and taken to be only such stock as should exceed the number of sheep at the time of the testator's death; and in the event of any sale making the number less, the proceeds of the sale of the sheep so sold in reduction of the number existing at the time of the testator's death, should be deemed part of the principal of the trust, and invested as in the will directed concerning the proceeds of the real and personal estate. 4. The testator

died leaving his widow, the defendant, Maria Hallett, and ten children him surviving, all or portion of whom were entirely dependent on the testator for their support. 5. The said Edward Regia Hallett has duly assigned all his shares and interest under the will to the plaintiffs, Catherine Hallett and Henry Archibald Price, and the share of the said Sarah Maria Carlile under the will has been duly assigned to the plaintiffs, Frank Rymill and Walter Reynell. 6. At the time of his death, the estate of the testator was insufficient to pay the liabilities, and consisted almost entirely of the sheep-farming business in the will referred to. 7. The said trustees decreed it expedient from time to time to carry on the said sheep-farming business, as empowered by the will, and continued so to do up to the end of the year 1878, when the stations and stock were sold, and the greater portion of the proceeds invested on mortgage. 8. During the time that the trustees were so carrying on the business, the annual income arising therefrom on many occasions greatly exceeded the liabilities, and was more than sufficient to pay the particular bequests and payments to be made under the will. 9. The trustees have paid out of this income from the business certain sums to Maria Hallett, John Hallett, Henry Hallett, Sarah Maria Carlile, Emma Goldsmith, Richard Hallett, Selby Hallett, Clara Wood, and Jessie Little, such sums being in the case of the widow less than the annuity of £550, and in the case of the children less than the proportion of the annual income that would have come to them had the whole of the net income been equally divided amongst the children of the testator after payment thereout of the said annuity and other payments to be made under the will. 10. The other of the testator's children have received no money whatever on account of the testator's estate, or their share of the income thereof. 11. The trustees contend that under the trusts of the will the testator's widow and children were not entitled to receive any income arising from the carrying on of the business, but were only entitled to share in income arising from the investment of the proceeds of the sale thereof, after the realization thereof; while Maria Hallett, and the others of the said beneficiaries, insist that under the trusts the widow was entitled to receive out of the income the annuity of £550, and that the

residue of the income should have been divided, according to the trusts of the will, equally amongst the testator's children. 12. There has been for a long time, and still is, a large sum of money in the hands of the trustees arising from the said income.

The plaintiffs claim—1. A declaration of the Court that under the trusts of the will Maria Hallett was entitled to have received an annual sum of £550 out of the income arising from the carrying on of the business, and that the residue of the income should have been divided equally amongst the children of the testator. 2. A decree or order for payment by the trustees over to Maria Hallett, and to the children of the testator, or to their assignees, of the arrears of income due to them, and also for payment of interest on such arrears. 3. Such further and other relief as the nature of the case may require, or to the Court may seem meet.

Downer, Q.C. (Attorney-General), for the plaintiffs.

Fenn for the defendants, Maria Hallett, Henry Thomas Morris, and Richard Hallett.

W. J. Belt for the defendants, Thomas Neville Wood and Clara Wood.

WAY, C.J.—We are agreed that the plain intention of the will, until the period of final distribution, was to give the wife an income of £550 a year, and the children an annual income of £50 each. The will contains a power to postpone the realization of the sheeprun, which formed part of the estate, and treat it as an investment for such period as the trustees deem desirable, and it also contains a declaration that the profits and increase that are more than sufficient to keep up the original number of the sheep shall be treated as income. It appears to us clear that it was the intention of the testator that his wife and children should receive the income which he gave from the profits of the estate, not merely after the realization of the sheeprun, but whilst the business was being carried on. We think there is nothing whatever in the will to oppose that construction. The contrary construction would enable the trustees to deprive the widow and

children of any income until the final realization and distribution of the estate, and there is an express declaration that the surplus stock over the original number shall be treated as income. Under these circumstances we think it is abundantly clear that the annuity for the widow and the income for the children was intended by the testator to be paid during the suspension of the realization of the sheeprun.

Declaration as prayed, costs of all parties to come out of the estate.

30 JULY, 1881.

IN THE MATTER OF JAMES McCAGHEY, A PRISONER.

HABEAS CORPUS.—Extradition Warrant—Offence - Depositions.

Prisoner was committed to gaol as being a person for whom a warrant had been issued in New South Wales for "fraudulent insolvency."

The New South Wales warrant set out that "the estate of (the prisoner) was sequestrated as Insolvent according to law, and that previously thereto, to wit in or about the month of March, 1881, at West Maitland in the said colony (New South Wales), the prisoner did embezzle part of his estate to the value of 40s. at one time, to wit the sum of £1,835."

Ths warrant did not state and there was no evidence that the acts set out in the warrant constituted an offence according to the law of New South Wales, and the same constituted no offence cognizable by the law of this province.

Held.—*That the warrant was bad, and prisoner must be discharged.*

RETURN to a writ of *habeas corpus*. The return set out the warrants referred to in the head-note.

H. F. Downer, for the prisoner—The interim warrant issued in this colony discloses no offence; the original warrant taken out in New South Wales discloses no offence recognised in this colony; and there is nothing to show that same constitutes an offence in New South Wales.

Attorney-General of Hong Kong v. *Kwok-a-Sing* L.R., 5, P.C., 179.

Insolvency Act, 1860 (sec. 211).

There is nothing to show that the prisoner was not dealing with his own money; and the warrant does not allege intent to defraud creditors.

Pater, for the Crown –To justify the extradition it is only necessary for the offence to be one recognised by the colony out of which the warrant is issued *(in re* West, 8, S.A. L.R., 84).

H. F. Downer, in reply.

BOUCAUT, J.—I would not decide in Chambers contrary to the dictum of the late Chief Justice Sir Richard HANSON, given in Court in West's case, even though I differed from that dictum. That question I should have referred to the Full Court if it had become necessary; but the other point taken is fatal. The South Australian interim warrant, although itself defective to a certain extent, points out the greater defect of the original warrant, because the South Australian warrant contains much more, viz., that the offence was one of fraudulent insolvency. But the South Australian warrant is only in operation to detain the prisoner till the original warrant appears, and that having been produced it must be looked at, as it is only under that warrant that the prisoner can be removed. The original warrant is open to precisely the same defect as the warrant in King's case (1 S.A.L.R.), namely, that it discloses no offence, and no evidence supplies the defect, even if evidence could be used, which I consider very doubtful.

Prisoner discharged.

1 AUGUST, 1881.

IN THE MATTER OF THE TRUSTS OF THE WILLS OF MAURICE AND CATHERINE FITZGERALD, AND OF THE PROPERTY ACT, 1860.

WILL.—Construction.—Debts.

A, sole executrix, devisee, and legatee under the will of B, by her will, after reciting that she was such executrix, devisee and legatee of B, and that she had not proved his will, appointed an executor and trustee "to carry out my wishes as follows:—I direct first that my funeral and testamentary expenses and all debts due by me, and also as executrix of my late husband, B, be fully paid and satisfied soon after my decease. . . . . When the youngest of my adopted children attains the age of 21 years my real property is to be sold by my trustee, and the proceeds equally divided between the said Ellen Fitzgerald and James Carney."

The estate of B, consisting of real and personal property, was of less value than the amount of his liabilities.

A died seised of real estate, but of no personal estate, except such as she was entitled to under the will of B, and was indebted to the amount in all of £78 odd.

Decreed—*That the estate of A was not liable to the debts of B, and that the real estates of both A, and B, be sold, and the proceeds of each applied in or towards payment of the respective debts due by A and B.*

PETITION under the Property Act, 1860, setting out as follows:—(1) That Maurice Fitzgerald, of Kensington, labourer, died on September 12, 1880, leaving a will bequeathing all his real and personal estate and effects to his wife Catherine; (2) Catherine Fitzgerald died on November 4, 1880, without having proved the will of Maurice Fitzgerald, but having first made and executed her will as follows:—"This is the last will and testament of me, Catherine Fitzgerald, of Thornton Street, Kensington, near Adelaide, in the province of South Australia, widow. I was appointed by my late husband, Maurice Fitzgerald, sole executor of his said will, and also sole legatee and devisee, so I have not proved his will, and I now appoint my friend Henry Ryan, of Carrington Street, Adelaide aforesaid, bootmaker, my sole executor

and trustee to carry out my wishes as follows :—I direct first that my funeral and testamentary expenses and all debts due by me, and also as executrix of my late husband, Maurice Fitzgerald, be fully paid and satisfied soon after my decease. I give in the first place the sum of £20 to my cousin Mary Duen, commonly called or spelt Dunneen, as a token of my regard for her, the same to be paid out of my personal estate and effects. I give, devise, and bequeath absolutely, having no child living of my own, to my adopted daughter, Ellen Fitzgerald, and my adopted son, James Carney, to be equally divided between them when my adopted son, the said James Carney, attains the age of twenty-one years. The said Ellen Fitzgerald, who is no relative of mine, though of the same surname, is a minor of the age of seventeen years, and the said James Carney is a minor of the age of fourteen years, so Henry Ryan, my executor and trustee, will act for them. When the youngest of my adopted children attains the age of twenty-one years my real property or freehold is to be sold by my trustee, and the proceeds equally divided between the said Ellen Fitzgerald and James Carney." 3. That probate of the will of the said Catherine Fitzgerald was granted to the petitioner by the Court on November 27, 1880; and probate of the will of the said Maurice Fitzgerald was also granted to the petitioner on February 7, 1881. 4. The said Maurice Fitzgerald died possessed of personal estate which has since been sold, and realized the sum of £91 8s. 5d., and of real estate to the value of £150, which is still undisposed of. 5. That the debts owing by the said Maurice Fitzgerald of which your petitioner has received notice amount to £259 15s. 9d. 6. That at the time of the death of the said Maurice Fitzgerald, and at the time of the death of the said Catherine Fitzgerald, she was possessed of real estate to the value of about £300, which is still undisposed of, but at the time of her death was not posessed of any personal property other than was mentioned in the fourth paragraph of this petition. 7. That the debts owing by the estate of the said Catherine Fitzgerald, and of which your petitioner has received notice, amount to the sum of £78 18s. 11d. Your petitioner therefore prays, in pursuance of the powers contained in section 25 of the Property Act, No. 6 of 1860, that your Honors will be pleased to direct whether, under

the powers contained in the said wills, your petitioner is at liberty to sell the real estate of the said Maurice Fitzgerald and of the said Catherine Fitzgerald, and whether your petitioner as trustee under the will of the said Catherine Fitzgerald is bound to pay the debts of the said Maurice Fitzgerald in full or only to the extent of the assets. Such further or other relief as the nature of the case may require.

Downer, Q.C. (Attorney-General) for the petitioner.—The testatrix's direction to her trustee to pay her own "funeral and testamentary expenses, and all debts due by me, and also as executrix of my late husband," refers only to debts due by her in her capacity as executrix, and for liabilities incurred by herself. The substantial question is the selling of the real estate. Mrs. Fitzgerald died with a personal and real estate valued at £300, and her debts amounted to £78 18s. 11d.—can the trustee sell the estates? Where a testator charges his real estate with the payment of debts the law will infer power to sell. If a clause be introduced postponing the sale the law will look upon it merely as a condition subsequent.

2 Jarman on Wills (3rd ed.) 560
Ball v. *Harris*, 4 M. & C., 264.

BOUCAUT, J.—I shall put that construction on the will, as I think it the best course to follow, though if it were a heavy case I should take time to consider it. There will be an order directing that the real and personal estate of Mrs. Fitzgerald is not subject to her husband's debts, and that the real estate of both be sold and the proceeds applied in the liquidation of the debts in their respective estates.

Order accordingly.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [COMMON LAW.

19 AUGUST, 1881.

BARNETT v. THE CORPORATION OF PORT ADELAIDE.

MUNICIPAL CORPORATIONS ACT, 1881.—*Footpaths—Artificial Works—Repair—Negligence.*

Under the Municipal Corporations Act, 1880, *Corporations are liable to keep in repair footpaths and other artificial works constructed by them, so that the same may not become a nuisance or source of danger. Plaintiff, while passing along a public footpath in Port Adelaide, which had been constructed by the defendant Corporation, in consequence of the defective condition of such footpath, fell and broke his leg.*

Held—*That the defendant Corporation was liable to compensate the plaintiff for the injuries he so sustained.*

RULE for a new trial, or to enter a verdict for the defendant.

The action, which was tried in the Local Court of Port Adelaide, was for damages sustained by the plaintiff, through the negligence of the Port Adelaide Corporation in failing to keep in repair a footpath which had been constructed by it. The plaintiff while walking along such footpath at night, put his foot into a large hole and fell and broke his leg. The facts sufficiently appear from the arguments and judgments. At the trial a verdict was given for the plaintiff for £50.

On motion for the rule, the following authorities were cited :—

Parsons v. *St. Mathew's, Bethnal Green*, L.R. 3, C.P., 56.
Metcalfe v. *Hetherington*, 24 L.J., Ex. 319.
Wilson v. *Mayor of Halifax*, L.R., 3 Ex., 114.

Symon, Q.C., now moved that the rule be made absolute.

Downer, Q.C., Attorney-General, showed cause—In the case of

Parsons v. *St. Mathew's, Bethnal Green*,

cited on the rule, it was held that the Vestry were merely surveyors, and that no action would lie against

them, but the parish could be indicted. The Vestry had simply a power which they could exercise or not at their discretion. It the case of

Wilson v. *Mayor and Corporation of Halifax*,

it was held that the Corporation had not made the hole and were not bound to fence it in. There was no misfeasance, but only non-feasance, and no duty in these cases, and therefore no action could lie. The case of the

Borough of Bathurst v. *Macpherson*, 4, App. Cas. 256,

decided in 1879 is conclusive on the point involved. Assumming that it was discretionary for them to make or not to make a footway or road, if they do make it they must take care that it does not become a nuisance. If they make it in such a way that in the ordinary course of things something afterwards happens that renders it dangerous to the public they are liable. [ANDREWS, J.—You must show notice to the defendants of the existence of this nuisance.] No. It is their business to know, as they have the sole care and control of it. [WAY, C.J. —They showed their ability to do the work by doing it after the accident occured.] It this case there was the clearest misfeasance. Without this footpath the accident to the plaintiff could not have happened, because it was built up of silt. The defence is really based on the words of the Corporation Act, which, after making the Corporation Commissioners of roads, also makes them the only persons who have any right to make or interfere with the roads or footpaths. Clause 90 of the Act of 1880 makes them Commissioners of public streets in the same way as the New South Wales Act, Section 98, provides that the Council shall decide in what way the roads shall be made and what material shall be used. It does not say that they shall, but that they may do it. But if they do do it they must do it properly in the first instance, and keep it in proper repair afterwards. Silt is rather shifting, and not a very good thing for the raising of footpaths like the one that is now in question. It has been stated that the injury to this footpath was caused by children jumping on it,

but it could not have been affected by this if it had been properly made. The defendants having made an artificial work, which might become dangerous, it was their duty to take care that it did not become so.

Foreman v. *Mayor, Alderman, and Burgesses of Canterbury*, L.R. 6, Q.B. 214.

Roscoe's Digest (14th Ed.), 690,

cited by *Mr. Symon*, merely shows that persons in the position of surveyors are not liable for misfeasance. The case of

Metcalfe v. *Hetherington*, 24 L.J., Ex., 314,

distinguishes itself.

Symon, Q.C., in reply—The decision in the three Common Pleas cases was upon the construction of the Act of Parliament transferring the powers by the parish to the Vestries, and not the question of transferring the liability from the parish to the Vestry. The liabilities of Municipal Corporations are to be determined according to the express wording of the Act of Parliament. The cases conclusively show that there is no liability for non-feasance at all on the part of the body occupying such a position as this, and having discretion over certain works, as this Corporation had. The New South Wales Act does not go nearly as far as our Act. There is no duty or obligation on the defendants to make or repair the footpaths or roads, and there is an absolute discretion vested in them as to materials with which they are to make or repair. [WAY, C.J.—That they might proceed in their discretion does not mean that they have discretion to cause a nuisance.] [BOUCAUT, J.—Have they not that discretion in New South Wales?] No. [Way, C.J.—The Act implies a discretion.] In

Parsons v. *St. Matthew's, Bethnal Green*,

it is laid down that before liability can be fixed on a corporate body for non-feasance there must be this duty cast upon them,

[WAY, C.J.—The case in the Privy Council says where they have that discretionary power, and exercise it in such a way as to cause a nuisance, they are liable.] [BOUCAUT, J.—You cannot say Section 98 is a limitation.] It gives an additional discretion. [WAY, C.J.—Do you think that the Privy Council would have held the Bathurst Council liable if they had had this section of the Act before them?] No; I do not think so. [BOUCAUT, J.—The Section simply has more words to express the same thing as the New South Wales Act.] The work is not to be considered a nuisance, as it only arise from the disrepair. [WAY, C.J.—If the defendants make an artificial work, they must prevent it becoming a nuisance, and from being dangerous to persons passing along the highway.] It is only a question of degree as to whether the hole is a matter of disrepair or nuisance. If the disrepair arose from the material used—of which they have the discretion—the Corporation would not be liable. Otherwise the words of the Act would have no effect whatever.

WAY, C.J.—I am of opinion that the decision of the Court below is right. The footpath in question is an artificial work which the Corporation of Port Adelaide have constructed under the general powers contained in the Corporation Acts authorizing them to construct footpaths and carry out other public works. But they have done it in such a manner that there was a hole in the highway dangerous to passengers, and down which the plaintiff fell and broke his leg. Now, in the case of the *Borough of Bathurst* v. *Macpherson*, the Judicial Committee of the Privy Council held, on precisely similar facts, undistinguishable in point of law, and upon a similar clause in the Corporation Act of New South Wales, that the Corporation would be liable under such circumstances. But it was endeavoured on the part of the defendants to relieve them from the liability, and to distinguish the decision of the Privy Council, on the ground that the South Australian Corporation Act contains in Section 98 a discretion with respect to repairs that is not contained in the New South Wales Statute. But it will be seen on a careful examination of the decision of their Lordships in the Privy Council that they expressly avoided giving any opinion whatever as to the obligation that was cast upon the

Corporation in New South Wales of effecting repairs, but they said where artificial works were constructed the duty was cast upon them of keeping the artificial work they had created in such a state as to prevent it causing danger to passengers on the highway. The discretion under the Corporation Act is a discretion to repair, not to make the works dangerous or in such a way as that they may become dangerous in course of time. In order to give effect to the arguments of *Mr. Symon* it would be necessary to add to the provisions referred to an additional clause, that it should be in the discretion of the Corportion to allow their works to become dangerous to passengers. No Legislature would, in my opinion, pass such an enactment as that, and certainly it appears to me it cannot be implied on a fair examination of the language of the Statute. I am of opinion, therefore, that the appeal must be discharged.

BOUCAUT, J.—It is almost unnecessary for me to add anything to what the learned CHIEF JUSTICE has said. The case in the Privy Council is in almost every respect this case, so far as the fact and general law are concerned, except that the general law of New South Wales would be qualified by the extra discretion vested in the Corporation by Section 98. If the Legislature had intended to give the Corporation a discretion beyond the ordinary discretion contained in the New South Wales Act, that in making repairs they might carry them out to the extent of being a nuisance, they would have said so. And as they have not said so I am clearly of opinion the 98th Section does not extend the discretion beyond that in the New South Wales Act. Probably if a creek like the Tam O'Shanter Creek had been left in a state of nature, and a person tumbled into it, the Corporation would not be liable, and probably they would not be liable if they put up a fence which afterwards got into a state of disrepair and a person fell into the creek. But supposing that they put up a fence with the jagged ends sticking out into the middle of the road, notwithstanding that they have a discretion, they would, I think, be liable. I do not think that discretion went to anything like the extent contended for by *Mr. Symon*. There is no difference in principle between the law here

and in New South Wales, which I think must be followed in this instance.

ANDREWS, J.—I cannot follow *Mr. Symon* in his endeavour to distinguish the case of the *Borough of Bathurst* v. *Macpherson* from the present one. The Acts of both colonies seem to give similar power to both Corporations. In this case the evidence, to my mind, certainly substantiated the existence of a nuisance which was caused by the negligence of the Corporation. The accident was clearly the result of a dereliction of duty on the part of the defendants.

Rule discharged with costs.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [COMMON LAW.

29 AUGUST AND 2 SEPTEMBER, 1881.

S.A. INSURANCE COMPANY (LIMITED) v. S.A. MUTUAL FIRE INSURANCE COMPANY (LIMITED).

COMPANIES ACT, 1864, *Section* 20—*Similarity of names—Injunction.*

The plaintiff Company had for many years carried on business as a Fire, Marine, and Life Insurance Company at No. 98, *King William Street, Adelaide, under the name of "The South Australian Company, Limited."*

In June, 1881, *the defendant Company commenced to carry on the business of Fire Insurance in premises in Waymouth Street, from whence, in July following, it removed to premises known as No.* 71, *King William Street, Adelaide, under the name of "The South Australian Mutual Fire Insurance Company, Limited."*

Both Companies were registered under the Companies Act, 1864.

Held—*That the plaintiff Company was, under the above circumstances, entitled to an injunction restraining the defendant Company from carrying on the above business under the name above-mentioned.*

MOTION for an injunction to restrain the defendant from carrying on the business of Fire Insurance under the name of "The South Australian Mutual Fire Insurance Company."

The claim set out—(1.) The plaintiff Company was registered on the 3rd day of July, 1867, under the name of South Australian Insurance Company, Limited, in accordance with the provisions of the Companies Act, 1864, and on the 4th of July, 1867, the Registrar of Companies notified in the *South Australian Government Gazette* that the plaintiff Company was incorporated as a limited Company under the Companies Act, 1864, and the plaintiff Company thereupon became duly incorporated under the said Act. (2.) The objects of the plaintiff Company are set forth in its memorandum of association as follows:—(*a*) To accept, purchase, and take over the business, property, and securities of the S.A. Insurance Company, Limited, and take upon them the risks on present or running policies and all other liabilities of the said S.A. Insurance Company, Limited, and to indentify and hold harmless

the said S.A. Insurance Company, Limited, and their Trustees, Directors, and other officers and servants, from all actions, suits, claims, and demands whatsoever. (*b*) The insuring of houses, buildings, goods, chattels, and all other kinds of property against destruction by fire. (*c*) The carrying on the general business of a Marine Insurance Company. (*d*) The effecting insurances upon lives. (*e*) Granting annuities and endowments. (*f*) Purchasing reversions. (*g*) The establishing branch offices in any part of the world. (*h*) The doing of all such things as shall be incidental or subsidiary to the aforesaid objects. (3.) The plaintiff Company has, ever since the 4th of July, 1867, carried on, and is still carrying on, the business of fire insurance in its office, situated at No. 98, King William-street, and has become very well-known by its said name, and has acquired a wide connection, a high reputation, and a large and profitable business. (4.) On the 16th of June, 1881, the defendant Company was registered under the provisions of the Companies Act, 1864, under the name of the South Australian Mutual Fire Insurance Company, Limited, and on June 23, 1881, the Registrar of Companies notified in the *South Australian Government Gazette* that the defendant Company was incorporated as a limited Company under the provisions of the Companies Act, 1864, and the defendant Company thereupon became incorporated under the said Act. (5.) The objects of the defendant Company are set forth in its memorandum of association as follows :—1. The making and effecting insurances on houses, warehouses, and buildings, and on goods, chattels, growing and standing crops, haystacks, and property of all descriptions, against loss or damage by or through fire, and generally the carrying on of the business known as fire insurance. 2. To invest moneys in or upon mortgage or purchase of real and personal property in South Australia. 3. To enter into treaty, act, unite, or amalgamate with, buy up, or absorb any other fire insurance company. 4. To borrow money for all or any of the purposes aforesaid. 5. The undertaking and carrying out all such powers, purposes, and objects as the Company may in general meeting or otherwise as may be provided by the Articles of Association from time to time determine shall be undertaken and carried out. 6. The doing all such things as are or may be incidental or conducive to the attainment or carrying into

effect of the above objects, purposes, and powers, or any of them. (6.) The defendant Company, after its incorporation as aforesaid, commenced to carry on the business of fire insurance under its said name in an office in Waymouth-street, Adelaide, and on July 18, 1881, the defendant Company commenced to carry on its business in an office situate at No. 71, King William-street, Adelaide, where it still carries on the same. (7.) The plaintiff Company says that the carrying on of the said business by the defendant Company as aforesaid, and particularly in the said last-mentioned office under the said name, is calculated to mislead the public, and has caused and will cause the defendant Company to be confounded with the plaintiff Company, and has been and will be the means of inducing people who desire to insure in the plaintiff Company's office to insure by mistake in the defendant Company's office instead, and that the defendant Company, by carrying on its business under its said name and in its said last-named office, represents that the said business is the business of the plaintiff Company. (8.) The plaintiff Company says that the defendant Company is carrying on its said business under the said name in the said last-named office fraudulently, and with the fraudulent intention of misleading the public and appropriating the plaintiff Company's business. The plaintiff Company claim an injunction restraining the defendant Company from carrying on its business under its said name, and such further and other relief as the nature of the case may require.

Affidavits in support of the claim, made by Messrs. R. E. Tapley (the Secretary to the plaintiff Company), who had had 30 years' experience, Geo. Boothby, Thos. Linklater, Abraham Abrahams, and the secretaries of twelve other insurance companies in Adelaide, were read, to the effect that the similarity of names of the two companies would be liable to mislead the public, and to cause confusion in the minds of those desiring to insure.

Affidavits in support of the defendant Company's contention that the word "Mutual" was sufficiently distinctive were read from Messrs. C. A. P. Jones (Secretary to the Company), J. C. Minns, T. E. Bury, J. Preston, and several other gentlemen, who described

themselves as merchants. The affidavit of *Mr. J. W. Bakewell*, the solicitor to the Company, was to the effect that the plaintiffs urged their objection when the defendant Company appeared before the Registrar of Companies, and that the objection was dismissed; that on May 27 the Registrar expressed a desire to reconsider his decision, but that *Mr. Bakewell* objected that the matter had already been decided; and that on June 16 the defendant Company was duly registered.

H. E. Downer and *Nesbit* for the plaintiffs cited—

Merchants' Banking Company of London v *Merchants' Joint Stock Bank.* L.R., 9 Ch. D., 560.
Hendriks v. *Montagu*, 44 L..T, 89.
Lee v. *Haley*, L.R., 5 Ch., 155.
Orr, Ewing, & Co. v. *Johnston & Co.*, L.R., 13 Ch. D., 434.
Boulnois v. *Peake*, L.R., 13 Ch. D., 513 n.

Symon, Q.C., and *C. C. Kingston* for the defendant Company cited—

Civil Service Supply Association v. *Dean*, 13 Ch. D., 512.
London and Provincial Law Assurance Society v. *London and Provincial Joint Stock Life Assurance Company*, 17 L.J., Eq. 37.
London Assurance v. *London and Westminster Assurance Corporation, Limited*, 32 L.J., Ch., 664.
Colonial Life Assurance Company v. *The Home and Colonial Assurance Company, Limited*, 33 L.J., Ch., 741.
Ragget v. *Findlater*, L.R., 17 Eq., 29.

WAY, C.J.—In this case we have had the advantage of having very exhaustive and very able arguments on both sides, and the authorities have been carefully examined and brought under the notice of the Court. The law relating to cases of this kind where an injunction is sought to restrain a Company from carrying on business under a particular name, so as to affect or injure another Company, has had a great deal of light thrown upon it by recent decisions. There are the able judgments of the present MASTER OF

THE ROLLS, and more particularly there is the leading case of *Hendriks* v. *Montagu*, which went to the Court of Appeal and was decided by some of the most distinguished Judges in England. That decision undoubtedly followed a previous decision of Lord Justice GIFFARD when Vice-Chancellor, but the doctrines and principles on which that case depended were never previously so clearly stated as they were in the one quoted, and I agree with the observations of my learned colleague, Mr. Justice BOUCAUT, in the course of the argument, that, if we had been called upon to decide the present motion upon the authorities as they existed prior to the decision in the case to which I have referred, we should not have been prepared to give judgment, as we were now doing, without calling upon *Mr. Downer* to reply; and, in all probability, our decision would have been different from what it is; but the law as it is left by the case of *Hendriks* v. *Montagu* is singularly clear. In the first place, there is no monopoly of a particular business; it is open to the defendant Company to carry on its business on such principles, and such terms, as to attract from existing Companies the whole of their business, and to obtain, if it offers sufficient inducements to the public, a practical monopoly of insurance business, to the detriment of other Companies; and, secondly, there is no such thing as a monopoly of particular words in the English language. The defendant Company is at liberty to select the name by which it is to be designated. For instance, the defendants were entitled—and I make this observation at once in order to prevent any misunderstanding about a remark I made during the argument—to make as prominent as they pleased the fact, that they did business upon such terms as entitled them to call themselves a mutual Company. They may not be so in the strictly logical sense of the word, but they do give to insurers the benefit of a portion of their profits, and therefore they are entitled to call attention to the fact in the name of the Company in as prominent a way as they please; and, undoubtedly, they are entitled to call themselves a South Australian Company. These rights, however, are limited by another rule established by the case I have referred to—namely, that a Company is not entitled to call itself by such a name as, by reason of its identity with or similarity to the name of an existing Company, would have the effect of attracting to it business that

would otherwise go to the previously established Company. Now, as was pointed out by the Lords Justices in their judgments, the application of this rule is always a question of fact. A good deal of evidence has been given on both sides. There is, first, the evidence of a number of gentlemen whose business it is to devote their attention to insurance matters, and to watch the effect upon the public of the names of the different Companies, and the means which are taken for the purposes of attracting business—gentlemen who are not merely of high standing in their calling, but as members of the community. Their evidence is, that the effect of the names of the plaintiff and defendant Companies would be to create such a confusion, as to unwittingly attract insurers to the defendant Company, under the impression that it was the plaintiff Company. On the other hand, there is the evidence of gentlemen of equal respectability, who say that they have had a great deal of experience in insurance business as customers, and two of them as insurance agents. They say that no such effect would follow. Numerically the witnesses are in favour of the plaintiff Company; but I have no reason to suppose that those for the defendant Company had any intention of conveying any other than a fair expression of their opinion to the Court. In this conflict of opinion on the part of experts the Court is called upon to decide the question of fact, and it appears to me, with respect to the plaintiff Company, that its distinctive name as an Insurance Company is undoubtedly the *South Australian* Insurance Company. Then it carries on, besides the business of marine insurance, that of fire insurance, and if the word "Fire" were simply inserted after the words "South Australian" in the name of the new Company, confusion would necessarily follow, as it appears to me. If the word "Mutual," which is said to be the distinctive feature of the defendant Company, were placed in the middle of its name, in such a collocation with the other designating words as not to call special attention to it, the word is lost amongst the others. I quite agree with the evidence given on the part of the plaintiff Company as to the popular designation of Insurance Companies, the catchwords being the first one or two in the name, and this is an additional reason for leading me to the conclusion that the additional word introduced into the defendant Company's name would be altogether lost sight of by intending

insurers. Under these circumstances, whilst I altogether exonerate the defendants from any original intention to mislead the public, their attention having been called to the fact that it would be injurious to the plaintiffs' interest if they designated themselves by a name similar to the plaintiffs, it seems to me altogether inequitable that they should be allowed to carry on business to the plaintiffs' injury under that designation, and that the plaintiffs are entitled to the injunction.

BOUCAUT, J.—I wish to say that if I had taken this case in Chambers, as probably the MASTER OF THE ROLLS took his case, I think that, apart from the arguments I have heard, and from the case of *Hendriks* v. *Montagu*, I should have come to the same conclusion as the MASTER. I was not at all influenced, at first, by the able argument for the plaintiffs. There is no monopoly in the title of South Australia, and I felt very strongly upon the point, as probably did the MASTER. I felt also that there was no fraud, and, therefore, I should have come to the conclusion, that the plaintiffs had not the right which they sought to establish, but which in my judgment, since reading the case of *Hendriks* v. *Montagu*, they have established. I should have struggled, so far as my individual views were concerned, against any monopoly of the words South Australia, which are not, like Britannia, Globe, or Anatolia, selected at large, and should have confirmed the principles laid down by the MASTER OF THE ROLLS, on which all similar cases prior to *Hendriks* v. *Montagu* have been decided, save one on which Lord Justice GIFFARD sat. The Privy Council, which is the Appeal Court for this colony, has intimated that Colonial Courts should follow the decisions of the English Court of Appeal, and, that Court having upset the MASTER OF THE ROLLS' decision in *Hendriks* v. *Montagu*, I can have no doubt in the present case. With regard to the affidavits, I express no judgment in any way on the facts. Probably they are favourable to the plaintiffs, but certainly not to the defendants, and I think it was unnecessary for the plaintiffs to extend them as they have. Lord Justice JAMES, in giving his decision in the case of the Universe and Universal Companies, put the matter this way—are persons intending to insure with the one likely to go to the other, owing to

the similarity of names? and, in applying the same question in the present case, I believe, apart from the affidavits, that they are. Since the last argument my view has changed about the question of a letter sent to the one Company being delivered to the other. A letter for the "South Australian Fire Insurance Company" might be properly enough addressed to the plaintiff Company, though it would not be the correct name of the Company, and though *Mr. Symon* said it would rather designate the defendant Company, I cannot see it. This shows that there would be a probable confusion in the use of the two names, and, following the decision of the Court of Appeal, I hold that the plaintiffs are entitled to the injunction.

ANDREWS, J.—I have considered the evidence carefully, and the arguments on both sides, which were clear and exhaustive, and I have come to the same conclusion as my colleagues. I consider it unnecessary for the plaintiff Company to bring forward absolute proof of injury, as urged by counsel for the defendant Company, and, as the latter did not start business till June 16, and the writ was issued on July 13, there could hardly have been time for injury to have been done. With regard to the chance of the similarity of names misleading persons, I consider it probable that, with the view of competing with the old Company, the new one has got a name as similar to it as possible. I hold that the injunction should go.

Injunction granted until trial or further order.

BOUCAUT, J.] [CIVIL SITTINGS.

1 AND 5 SEPTEMBER, 1881.

FOWLER v. SANDERSON.

CUSTOMS ACT, 1864—*Tariff Act*, 1876—*Duty—Chicory—Chicory root.*

By the Tariff Act, No. 34 *of* 1876, *a duty of fourpence per pound is imposed on "Chicory, Coffee, roast or ground."*

The article commonly known in the trade as chicory is a brown powder, being the chicory-root dried and ground.

The plaintiffs having imported a quantity of green chicory-root, deposited with the defendant, Collector of Customs, pursuant to Sections 136 *and* 137 *of the Customs Act*, 1864, *the amount of duty claimed by him in respect thereof, being at the rate of fourpence per pound, and sued for such amount, with interest.*

Held—*That the duty had been properly charged by the defendant.*

THIS was an action brought by Messrs. D. & J. Fowler against the defendant, the Collector of Customs, to recover, with interest, a sum of £37 16s. 8d., being the amount of duty claimed by, and, pursuant to Sections 136 and 137 of the Customs Act, 1864, deposited with the defendant in respect of certain chicory-root imported by the plaintiffs. The facts and evidence sufficiently appear from the pleadings, arguments, and judgment.

The claim set out:—1. The plaintiffs are merchants carrying on business at Adelaide, Port Adelaide, and elsewhere. 2. The plaintiffs lately imported a quantity of the green root of the chicory plant, being the raw material used in the production of the manufactured article known to the trade as chicory, and applied to the defendant, as Collector of Her Majesty's Customs, to enter and clear twenty bags of the green root free of duty; but the defendant insisted that it was subject and liable to a duty of fourpence per pound under the Act No. 34 of 1876, intituled "An Act to amend the laws of the Customs," and demanded payment thereof. 3. The plaintiffs disputed the liability of the green root to the duty; but in order to obtain

delivery they paid and deposited the amount of the duty so demanded by the defendant under and pursuant to Sections 136 and 137 of the Customs Act, 1864, and now bring this action pursuant to the Section for the purpose of ascertaining whether any and what amount of duty was or is due and payable upon the goods, and for the purpose of receiving back the amount so deposited as aforesaid. 4. The value of the twenty bags of green root is £8. The amount of duty then so demanded and deposited is £37 16s. 8d. 5. Before and at the time of the passing of the Act No. 34 of 1876, and for long afterwards, the only article known to the trade of the province as chicory and imported under that designation was a dry powder, being a manufactured article, roast and ground, and the plaintiffs say that the manufactured article was and still is the chicory of commerce, and of the tariff under the last-mentioned Act. 6. The word chicory would not describe, or be understood in the trade to mean or describe, the green root of the chicory plant, but only the manufactured article. 7. The green root of the chicory plant or wild endive is a vegetable, in appearance and texture closely resembling the common parsnip, and is the raw material used in the manufacture of the chicory of commerce, to produce which the green root has to be kiln-dried and therein desiccated by wasting, and it takes six tons and a-half of the green root to produce one ton of the chicory of commerce, equivalent to about 15 per cent., just as beetroot, a vegetable admitted free of duty, contains up to 18 per cent. of sugar. 8. The twenty bags form portion of a large quantity of about fifty-four tons, imported by the plaintiffs for the purpose of manufacture, and now in bond, and likely rapidly to spoil and rot. The green root is bought and sold by tons, not pounds-weight. The plaintiffs claim the sum of £37 16s. 8d., with interest, pursuant to Section 137 of the Customs Act of 1864.

The defence set out:—1. The defendant denies the allegations contained in paragraphs from 2 to 8 inclusive of the claim. 2. The defendant says that the green root imported by the plaintiffs was chicory, and that under the Act No. 34 of 1876 the same was subject and liable to the duty demanded by and paid to the defendant.

Symon, Q.C., and *Dempster* for the plaintiffs.

The question is whether the green root of the chicory plant, which contains about a one-seventh part of the manufactured article, is liable to pay this duty of fourpence per pound. Chicory-root is the raw material used in the production of the manufactured article. The material has to undergo three processes before it becomes what is known to the trade as chicory. The value of the material is about £8 per ton here. It costs £7 in Melbourne, and £1 for the charges connected with it here. The cost of the manufactured article is sevenpence one farthing per pound, including duty. The whole cost of the green root brought here to be manufactured without the duty is one penny per pound, but with the cost of manufacture and the duty it is 1s. 11½d. per pound, and, therefore, the imposition of this duty would be absolutely prohibitive to the manufacture of this article from raw material imported to this Colony. The genius of the Act is to admit raw materials for the purpose of manufacture duty free. Barley is free, but pearl barley is subject to a duty of one penny per pound, and malted barley to a duty of sixpence per bushel. Beans and peas are free, but split peas are subject to a duty of one penny per pound; and so with grapes, gum arabic, linseed, maize, fresh vegetables, and many others. In this particular line of tariff the word chicory is included in the same category as coffee, roast or ground. In the schedule there is a comma after the word chicory, but the two things are treated as being in the same category. Apart from the construction of the Act, what is understood as chicory, is the manufactured article, a powder subject to the duty of fourpence per pound, and if anyone bought a pound of chicory from a merchant he would expect to get the powder, and not the roots. In a Customs Act the articles specified are as generally understood in their known commercial sense;

Maxwell on Statutes, 54, 9 Wheaton, 430
Attorney-General v. *Bailey*, 1 Ex., 281
Stanley v. *Western Insurance Company*, L.R., 3 Ex., 71.

Mann, Q.C., and *H. E. Downer* for the defendant.

The Court is bound to construe the word "chicory" according to its ordinary meaning.

Gwynne v. *Burnell*, 6 Bing. N.C., 560.

In the "Encyclopædia Britannica" and McCulloch's "Commercial Dictionary," the word chicory is used in describing the plant as a whole, and not merely the manufactured article. The construction of the various tariffs that have been in force here shows that, from the first, this particular article would have had to pay duty. Under Act No 16, of 1846, a schedule is given with fixed rates, and all the articles not enumerated in those rates are liable to a 5 per cent. *ad valorem* duty if raw material, and 10 per cent. if manufactured. Chicory is not mentioned in the free or fixed list which includes seeds and not roots; and Act 11 of 1848 includes, in the free list, plants, trees, seeds, and roots (garden.) And to show what the Legislature thought was included in "roots (garden)," the Act No. 15 of 1859 was introduced to include lucerne, clover, rye, and rye grass, as free, and which were not included in the "seeds and roots (garden)" in the previous tariff. Act 4 of 1851 had the same free list as the Act of 1848, and was repealed by the Act 8 of 1853. Chicory is not mentioned there, but all unenumerated articles were to be taxed at 5 per cent. *ad valorem*, except seeds and roots (garden). In the Act No. 3 of 1860, which repealed all previous tariffs, chicory was mentioned for the first time. It was there "coffee and chicory, 2d." There was no distinction in this tariff between raw coffee and roast coffee, whereas sugar had three different duties, and tobacco four duties. In the Act No. 6 of 1863 we find "coffee, chicory, chocolate per lb. 1d.," and in the free list "seeds and roots, including potatoes." In this Act there was no distinction made between raw and roast coffee. In No. 10 of 1870 a difference was made in these articles. There was "coffee (raw), 2d.," and then bracketed below "chicory per lb., coffee (roast or ground), 4d." Manufactured cocoa in this Act was 2d., and cocoa nibs were on the free list. [BOUCAUT, J.—That supports *Mr. Symon's* contention that the genius of the Act was in favour of the admission of raw material free.] No. Where the Legislature intended any article to be free they distinctly said

so. The Act of 1870 is the last in which a free list appears, and n that Act the word "roots" is excluded from the free list for the first time. So it is clear that the chicory-root would not have been admitted free of duty. In order to make *Mr. Symon's* arguments good the word "manufactured" would have to be introduced into the tariff, as it is admitted that all the samples produced are chicory. In the present Act, No. 34 of 1876, we find "coffee (raw), cocoa, chocolate, 3d.," and in the next line "chicory, coffee (roast or ground), 4d.," as distinguished from the "coffee (raw)," in the previous line. There are the fixed list, two *ad valorem* lists, and no free list at all. In this tariff, wherever the Legislature intend an exception, it is invariably specified. The Imperial Act, passed in 1876, imposed a duty of 13s. 3d. per cwt. on the raw material, and 2d. per lb. on the roasted or ground. The tariff has either been established for revenue purposes or protection. If for revenue purposes, then to admit this raw material free would be to frustrate that intention, for the person who imported the green root would save 3½d. per lb., and consequently not a single pound of roast or ground chicory would be imported. Under these circumstances the Court will struggle against an interpretation that would defeat the object of the Legislature. Then there is the object of protecting articles grown in the country, and this object would also be defeated if this raw material could be admitted free. There may have been another object. In England the manufacture of chicory is subject to many restrictions, for the article is considered a deleterious compound, and there is a penalty for selling chicory mixed with coffee unless the packages are labelled "chicory mixed with coffee." This high duty might have been put on to prevent the too free use of this drug. The claim states that the only chicory known in the colony is the brown powder. If so, the kiln-dried and roast could come in free. And it is in evidence that the roasted article is frequently used with coffee. The plaintiffs knew that the kiln-dried chicory would have to pay duty, so they understood chicory to mean something else than the powder.

Symon, Q.C., in reply.—In trying to arrive at the real meaning of the Legislature, one element is to look at the spirit of the

enactment as a whole. The argument of the other side means that if two articles of the same name, but of a different character, arrived at Port Adelaide they would be liable to the same duty. In previous tariffs all articles were dutiable except those enumerated on the free list, in the present one all are free except those specially mentioned. If *Mr. Mann's* arguments were correct, cocoa-nibs should be free, and therefore chicory-roots should be free. As to the construction of ambiguous words,

Att.-Gen. v. *Lockwood*, 9 M. & W., 393
Att.-Gen. v. *Lamplough*, 3 Ex. Div., 225
Dwarris on Statutes, 580.

There is a differential duty in the Imperial Act for raw and manufactured chicory, and also in the local tariff in reference to coffee; and so if there was to be a duty at all on raw chicory, it would not be the same as on the manufactured article. English legislation cannot affect this question. The obvious criticism on that tariff is that the raw or kiln-dried does not apply to the root. With regard to the letters plaintiffs have written, the words which have been used indiscriminately are chicory, chicory-root, root, green root; and it must be remembered that they were written and received by those who understood what the subject was.

BOUCAUT, J.—If I had any doubt as to what my judgment should be, I would take time to consider it; but I have no doubt, and I therefore think it desirable, and convenient to both parties, especially as there is an appeal, that they should know what my judgment is at the present time. I do not mean to say that there is no doubt in the case, for the elaborate and powerful arguments of *Mr. Symon* made it very doubtful indeed whether, if the Legislature had had all that he has shown before them, they might not have further considered the point. But I have not to consider all sorts of subtle doubts that men in trade and commerce or men of the genius of the learned counsel can raise upon what ought to be meant by the Act. I have simply to lay down what the Legislature has said, using my best judgment on the meaning of the words of the Act as they are written. *Mr. Symon* quoted one of the learned judges, who said that if anything seemed absurd, incon-

venient, mischievous, or objectless, if the words were construed in a particular manner, it might raise doubt, although they were not to overpower the clear use of the words. But there is nothing absurd, inconvenient, or mischievous in the construction contended for by the Customs in this case. Undoubtedly *Mr. Symon* has gone far to convince me that it might be, and probably it is, objectless. But I am not called upon to express an opinion on that; the question I have, as a Judge, to decide is, what is the meaning of the word "chicory." *Mr. Mann* says chicory means chicory. *Mr. Symon* says it means something else. *Mr. Mann* says it means chicory generally; *Mr. Symon* contends that it is chicory specially, and a particular part only of special chicory. Now, in aid of *Mr. Symon's* arguments, he has brought certain evidence upon which I do not consider myself called upon to express an opinion, because I go upon the effect of the evidence before me in support of the fifth paragraph of the plaintiffs' claim:—"Before, and at the time of the passing of the Act No. 34, of 1876, and for long afterwards, the only article known to the trade of the province as chicory and imported under that designation was a dry powder, being a manufactured article, roast and ground." Now, I should be inclined to say that is demurrable. It is not a question as to whether it is known to the trade, but whether it is known in an ordinary sense. Because, if it were only considered as being known to the trade, the case of a man who mixes in a shop something that is only known to him would have to be taken, as well as that of the wholesale grocer. That is not the true way in which the Customs Act is to be construed; the ordinary meaning should be put on a word. *Mr. Symon* has pressed me as to the construction put on the Act by the Customs officers. It, however, really has no legal bearing on the case. They did not know what it was, and so I cannot use against the defendant what took place between them and Mr. Kneebone. That could have no bearing on the legal interpretation to be placed on the word, although if, as I was led from the opening to suppose, the attention of the Customs had been called for some months to the case, I should have considered it on the question of costs. If the Customs officers, in their urgent desire to do their duty to the revenue, have been unduly skilful in deceiving or en-

trapping Messrs. D. & J. Fowler, I should have visited them with costs. And even if they had been remiss in their duty I would have excluded them from costs. But the question involved in my judgment is "chicory or no chicory;" not whether prohibitive of free trade or not. I have nothing to do with whether it is for the benefit of free trade. Messrs. Fowler say now this is green root, and not chicory. In their letters Messrs. Fowler applied the word "chicory" to what they now say is not chicory, and what they now say is not dutiable. And the merchant who sold the root spoke of it as chicory, and not as green root, and the farmer who grew it of course spoke of it as chicory, and not as green root. I must hold that the plaintiffs used the word in the ordinary sense, because before their attention was drawn to it they called it chicory. In the ordinary sense it means the root, as well as that ground out of it. The plaintiffs also used it in this sense. With regard to the Imperial Statutes, *Mr. Symon* says I cannot interpret the legislation of one colony by the Statutes of another. But on questions of tariff the Imperial Legislature keeps and holds a strict rule over the subordinate Legislatures, and I must recollect that the decisions of this Court can be appealed against in the Privy Council. And it is impossible to suppose that, if the Judges of the Privy Council had to decide the meaning of the word chicory in a case taken before them from here, they would not come to the same decision as the House of Lords in a similar case on appeal from an English tribunal. I cannot shut out that view in construing the meaning of the word chicory. The Imperial Act says "chicory or any other vegetable matter applicable to the uses of chicory or coffee." Then there is a distinction—"raw or kiln-dried chicory" (not chicory root), "roast or ground chicory" (not chicory root). I have before me, in this case, the four things —chicory raw, kiln-dried, roast, and ground: all four of them chicory—and, therefore, when these things are before me I should be straining the law—make myself a legislature if I put a different construction on these words from that clearly and palpably put on them in the Imperial Statute. I am convinced, therefore, that the word chicory is not used as chicory specially known amongst a particular class of merchants of more or less limited business, but as chicory generally. As to the authorities cited by *Mr. Symon*, that

from "Maxwell on Statutes," in regard to articles being spoken of in their "known commercial sense," at first much impressed me. But the authority cited by the author for this proposition does not carry it out, as it states that the words should be considered in their ordinary sense, and not in the limited sense referred to in the passage from "Maxwell." And in the other case cited by *Mr. Symon—Stanley* v. *Western Insurance Company*, L.R., 3 Ex. 7—the learned Judge said articles in the Excise Act were to be taken in the sense ordinarily understood, and not in their commercial sense. In the case of *Attorney-General* v. *Green* the article was dutiable, and it was held to be so, notwithstanding what shape it might assume. In this way chicory is liable to duty. In looking at our Acts, I am with *Mr. Symon* as to the distinction attempted to be drawn by *Mr. Mann* between chicory in the Acts of 1860 and 1870. He said because there was no mention of roots in the Act they must be excluded from the free list, but the fallacy is in using roots in place of chicory. Act 3, of 1860, is the first in which chicory is mentioned. Undoubtedly *Mr. Symon* has addressed a powerful argument to show that, as coffee and chicory are put together, they must be something of the same sort. In answer to this I have already shown from the Imperial legislation that the meaning of the word was chicory generic—in the lump. In the Act of 1863 the words have the same signification. Then came the Act of 1870, in which a distinction was drawn between coffee and cocoa raw and manufactured. I think that is in favour of the Customs, because, in the present Act, chicory and cocoa are left as they were in the previous Act, but a distinction is drawn in coffee, so that all cocoa and all chicory should be dutiable. But I put it on a broader ground: When there was a word used of ordinary signification I must give effect to it in its ordinary signification, and not in any limited or trade sense. And I am driven to that conclusion because the Imperial Legislature has used the term in the wider signification. The judgment will, therefore, be for the defendant.

Judgment for defendant.

29 SEPTEMBER, 1881.

IN THE MATTER OF GABRIEL BENNETT AND HENRY BENNETT, INSOLVENTS.

INSOLVENT ACT, 1860—*Offence—Wagering—Money lost out of the Colony—Gaming Act*, 1875.

Notwithstanding the Gaming Act, 1875, *which renders null and void all wagering contracts, and Section* 83 *of the Insolvent Act*, 1860, *which enables Assignees in Insolvency to recover back money paid for other than a valuable consideration, it is an offence under the Insolvent Act*, 1860, *for an Insolvent to have lost by wagering, within twelve months before the filing of the Petition for Adjudication, more than £20 in one day, and it is immaterial whether the wager in respect of which such money is lost, be made, or such money be paid within or without this Province.*

THIS was a special case, stated by WAY, C.J., acting as Commissioner of Insolvency, setting out as follows:—

1. Gabriel and Henry Bennett, of Adelaide, cattle salesmen, were, on the petition of William James Browne, filed in the Court of Insolvency, duly adjudicated insolvent on March 8, 1881. 2. The insolvents were examined at the Court of Insolvency, and, at the adjourned final hearing, held on June 28, various charges were preferred against Henry Bennett by the assignees and his creditors, under subdivision 11 of Section 125 of the Insolvent Act, 1860, and, amongst other charges, the following:—That the insolvent, Henry Bennett, within one year next preceding the filing of the petition for adjudication of insolvency, namely, on May 7, 1881, did lose by wagering, to wit, by betting on a race called the South Australian Stakes, £30; that, on November 9, 1880, he lost, by wagering on races run in Victoria, £160, and on November 8, 1880, at the same races, by wagering, £42, £40, £29, and £46; that, within one year next preceding the filing of the said petition, he lost, by wagering on certain races, within the one year, £800. 3. The evidence tendered in support of the charges proved that the insolvent, in one day, did lose, by gaming in South Australia, more than £20, and, within one year, more than £200, and paid such losses in South Australia. It was also proved that the insolvent,

within the period aforesaid, lost by gaming in Victoria, £20 in one day, and £200 in a year, and paid these losses, partly by cheque given by him in Victoria, but payable and paid in South Australia, and by one cheque of £160, given and cashed in Adelaide. It was also proved that the insolvent was unable to state the names of all the persons to whom he had paid the money so lost. At the respective times when such gambling losses were made, and the amount thereof paid, Henry Bennett was in insolvent circumstances.

The opinion of the Supreme Court is desired on the following points:—Whether upon the facts as above stated, the insolvent has been guilty of any offence in terms of subdivision 11 of Section 125 of the Insolvent Act, 1860, for which he ought to be ordered to be imprisoned under the provisions of the said section. 1. As to wagers lost and paid in South Australia; 2. As to wagers lost and paid in Victoria by cheque payable and paid in South Australia.

Mann, Q.C., for the insolvent Henry Bennett.

The Court has no jurisdiction as regards losses made by wagering outside the Colony. To constitute the offence there must be both a wagering and a loss, both of which must occur within the jurisdiction.

Moreover, gambling in itself is no offence unless it results in a loss. Here there is no loss, for, since the Gaming Act, 1875, the money can, under Section 83 of the Insolvent Act, 1860, be recovered back by the assignees. This section is analogous to Section 126 of the Imperial Statute 12 and 13 Vic. cap. 106, which has been held applicable to money paid without consideration.

Kensington v. *Chantler*, 2 M & S., 36
Ex parte Shorland, 7 Ves. 88
Brown v. *Bellaris*, 5 Mad. 53.

Without Imperial legislation giving that power, and there is none, the Court of Insolveucy has no jurisdiction over offences committed in Victoria.

H. E. Downer for Dr. Browne, the opposing creditor.

The insolvent comes to the Court and asks for his discharge, but before he is entitled to that he has to satisfy the Court of certain things, amongst others, that his debts have not been contracted through any improper causes. An offence under the Insolvent Act is very different from a criminal offence. The insolvent can always be released from imprisonment on payment of his debts. The jurisdiction is not limited to matters arising in the Colony. Section 134 gives to creditors beyond the jurisdiction the same remedies as local creditors. Whether the money can be recovered back is not the test. Money paid by way of fraudulent preference, whether within or beyond the jurisdiction, can be so recovered, yet the insolvent remains subject to the penal clauses of the Act in respect of such preference. Moreover, in this case the money cannot be recovered back, inasmuch as the insolvent has not been able to furnish the names of the persons to whom the same was lost.

Gall for the assignees.

Mann, Q.C., in reply.

WAY, C.J.—This case came before me in the Court of Insolvency, and, as it was one of first impression, I reserved the question for the consideration of this Court. I certainly do not regret that I so reserved it, because the exhaustive arguments which have been presented by the learned counsel on both sides, have freed my mind from any doubt at all with respect to the subject.

The object of the section of the Insolvent Act, under which the insolvent was directed to be imprisoned at the suit of the assignees, was undoubtedly intended to prevent persons in the insolvent's position from wasting the money that ought to go to their creditors in wagering or gambling. That was the object of the Act.

The learned counsel for the insolvent admits that, but for the Gaming Act, 1875, which was subsequently passed, the act of the insolvent in losing money within the Colony to the extent of £20 in one day, or £200 within a year, did render him liable to be imprisoned within this section of the Act; but, his contention is,

that, in consequence of the passing of the Gaming Act, 1875, that result no longer follows.

It is undoubtedly, at first sight, a startling proposition that an Act passed by the Legislature for the purpose of discouraging gambling and rendering unlawful many things that had previously been lawful, that an Act aimed against wagering contracts and gambling, should have the effect of repealing, by implication, the provisions for punishing the wasting, by the insolvent, of the creditors' money in gambling transactions. It would be strange that the subsequent enactment, which was intended to have the wider scope, and to discourage gambling altogether, should have the effect of enabling insolvents to waste their creditors' substance in that manner. In addition to this, it appears to me that the proposition is even more startling when it is remembered that a similar provision against gambling was passed in England in the Bankruptcy Act, 1849.

Similar Acts to the Gaming Act in force in this Province were the law in England. Evidently the Legislature was under the impression that the prohibition contained in this Act would render conduct such as the insolvent has been guilty of in this case punishable.

The argument on the first branch is, that the Act, 13 of 1875, Section 10, renders all contracts to game or wager void. Then it was urged that any wager made by the insolvent could not have been recovered from him, and Section 83 of the Insolvent Act, 1860, was referred to, which enables assignees to recover back money not paid for a valuable consideration, that is, amongst other things, not paid in pursuance of a valid contract. *Mr. Mann* argued that this money could be recovered back under this section, but a reference to the words of the Insolvency Act itself, shows that a loss made by an insolvent in wagering within a year preceding his insolvency, was not such a loss as the Insolvent Act contemplated as being capable of being recovered back. Although the assignees can in some cases recover back money from the person to whom it has been paid, yet the offence of the insolvent remains complete: the money has been lost by him. Of course there is the subsidiary

answer to that part of the case which has been pointed out by *Mr. Downer*. It was also lost to the estate, for it could not be recovered by the assignees, as the insolvent was unable to say to whom he paid it over.

Secondly, it was argued that this money could not be said to be lost in a wagering contract, because wagering contracts had been rendered void, and it was, therefore, not lost under any contract at all. It appears to me that the answer to that argument is that the words of the Act are not that the insolvent should have lost in a valid wagering or betting contract any sum of money, but the words are that he has lost in any sort of wagering or gaming, and that the transactions would as much come within the language of the Statute as if the money had been paid over in pursuance of a gaming contract which was illegal and void prior to the passing of the Gaming Act.

If that construction of the Statute be correct, then the application of the Act is not altered by the subsequent Act. But, with respect to that part of the case, my mind is fortified by the legal maxim relating to Statutes. *Generalia specialibus non derogant*; that is, a subsequent enactment of a general character does not repeal by implication a previous special enactment. The general enactment in this case, on which the learned counsel relied, was the Gaming Act, and the special enactment, not repealed by implication, was the section under which the insolvent has been ordered to be imprisoned. On principle, as well as upon the verbal construction of the Statute, it appears to me that the general argument on behalf of the insolvent fails.

But then, it is said, that part of the transaction — the wagering—was in Melbourne, and a large part of the money lost was paid out of the Colony. If the Court were dealing with a criminal act—with felony, treason, or misdemeanour, this would, in all probability, be an answer to the case. But, I agree with *Mr. Downer* that this section of the Insolvent Act, though penal in its character, does not deal with criminal offences. Crime is an offence against the public, and it must come within the classification of either treason, felony, or misdemeanour.

Misdemeanour is a public offence which is punishable by indictment, unless a summary procedure is provided in respect of it. Misconduct, which is the subject of the 125th Section of the Insolvent Act, is not a misdemeanour at all. They are innocent cases, so far as the general public are concerned, and they involve no penal consequences to the person committing them, or guilty of the omissions therein referred to, unless he become an insolvent. And then, the only result they have upon the insolvent is in so far as they may have an effect in delaying his discharge from imprisonment at the suit of the assignees. No doubt Section 125 describes the cases as offences, and speaks of their consequences as punishable, but the Court cannot fritter away the plain meaning of the Statute by verbal criticism of that kind, but must look at the substance. When we look from the form to the substance of the enactment, we find that these acts are not in their inception —nor in the way in which they are to be investigated or punished— crimes. Therefore it appears to me that the argument with respect to the want of jurisdiction fails, and that the insolvent was properly directed to be imprisoned in respect of both classes of offences, which are referred to in the order of the Insolvent Court.

BOUCAUT, J.—I have listened with very great admiration to the arguments of *Mr. Mann*, but I never had any real difficulty as to first part of his contention, the meaning of the word "lost." There is no canon for construing the words of a Statute clearer to my mind than that brought before me in the late Customs case—that the ordinary sense should be applied to the words under consideration. Looking at the Statute in this way, it is impossible to say that the money was not lost by some sort of wager. *Mr. Mann* says that it may possiby be recovered, but that depends upon other people, and, so far as the insolvent is concerned, it is lost, and I see no means, in this Colony, by which it can be recovered. *Mr. Mann* also says that the law is now different, with respect to wagering from what it was when the Insolvent Act, 1860, was passed, but I do not think that that alters the matter. The Legislature, when passing the Gaming Act, had not this Insolvent Act before their minds. A general Act, passed with the object of restraining gambling, could not affect this particular Act, which

deals only with a man, at the time and in the event of his, insolvency. I do not agree, either, with *Mr. Mann*, that his client should receive the benefit of the doubt he suggests, because, in cases affecting the jurisdiction of a Court and not the quality of the evidence given against a man, the Superior Courts endeavour to maintain the jurisdiction. I concede that the Court of Insolvency has no right to deal with offences of a criminal nature committed in another Colony, but the offence with which this insolvent is charged, is not a criminal offence. It is not a misdemeanour and could not be tried on indictment. The clause simply vests in the Court of Insolvency power to postpone the discharge of an insolvent who might, at Common Law, have been kept in goal perpetually. Under these circumstances I am of opinion that the decision of the Court below was right.

ANDREWS, J., concurred.

Decision upheld.

WAY, C.J., BOUCAUT, J.] [COMMON LAW.

21 OCTOBER, AND 16 NOVEMBER, 1881.

WALLIS v. DAWKINS AND ANOTHER.

DOG ACT, 6 of 1867.—Injury by dogs—Public highway—Scienter.

In an action against the owner of dogs for injuries done by them to a person lawfully passing along a public highway, no evidence of scienter is necessary to entitle the plaintiff to recover.

RULE to set aside the verdict for the defendant, and for a new trial on the grounds that the Court below improperly held that evidence of *scienter* was necessary, and that there was no such evidence.

The action was for damages sustained by the plaintiff through certain dogs of the defendants having rushed at and attacked him whilst he was passing along Kingston Terrace, North Adelaide.

At the trial, in the Local Court of Adelaide, a verdict was entered for the defendant, on the ground that there was no evidence of *scienter*.

On motion for the rule, the following authorities were cited—

Dog Act, 1867, Sec. 19.
Applebee v. *Percy*, L.R., 9 C.P. 647
Seymour v. *Coulson*, 5 Q.B.D. 359

Smith now moved that the rule be made absolute.

H. F. Downer showed cause—

Per *Curiam*.—No evidence of *scienter* was necessary. The rule must be made absolute; costs to abide the event.

Rule absolute accordingly.

BOUCAUT, J.] [EQUITY.

28 OCTOBER, 1881.

IN THE MATTER OF THE WILL OF JAMES HARRIS.

WILL.—Infant—Beneficiary—Maintenance.

A Testator devised and bequeathed his real and personal estate to Trustees in trust for his son G for life, with remainder to the first son of G in fee-simple, subject to a proviso that the estate should go to the second son of G in the event of the first son dying under the age of 21 *years, and with similar provisoes in the event of such second or any younger son dying under that age. The will further provided that during the minority of any minor presumptively entitled to the estate, the Trustees should accumulate the rents and profits for the benefit of the person ultimately entitled to the estate. G died, leaving his widow and one son H.*

Ordered.—*That the Trustees pay to the mother of H out of the income of the estate, a reasonable sum, which was fixed by the Court, for the maintenance and education of E.*

THIS was an originating summons calling upon the trustees of the will of James Harris, late of Marden, market gardener, deceased, to show cause why the sum of £300 per annum should not be allowed for the education and maintenance of Edgar Harris from May 8, 1881, and from time to time during his minority, and why such allowance should not be paid by such trustees to Marian Herberto Harris by half-yearly payments out of the income of the said infant's estate under the will, the first payments to be made forthwith; and why the cost of the application should not be taxed as between solicitor and client; and why the trustees should not pay the same out of any moneys that might come to their hands belonging to the infant.

James Harris, by his will, after making certain specific bequests, gave the residue of the estate to George Henry Harris, his son, for his life, with remainder to the first son of George Henry Harris in fee-simple. If the first son died under the age of 21 years the estate should go to the second and every subsequent son of George Henry Harris successively, according to seniority, in fee-simple, so that the estate of such second or subsequent son should, in the event of his death under the age of 21 years, be divested, and go

over to his next brother. If there should be no son who should attain the age of 21 years, the property to go to the daughter or daughters of George Henry Harris in fee-simple; and if there be more than one, as tenants in common. If there were no daughters the property to go to the heirs-at-law of George Henry Harris in fee-simple. There was also a declaration in the will that the trustees, during the minority of any person entitled to any real estate, or in expectancy to the testator's residuary, personal estate, or any part thereof, should receive the rents, issues, profits, interest, and annual income of the estate to which such person should be so entitled, and accumulate the same at compound interest by investing it and the resulting income thereof to the intent that such accumulations should follow the destination of the estate from which the same had arisen.

Downer, Q.C., Att.-Gen., for the applicants.

Symon, Q.C., for the trustees.

BOUCAUT, J.—Owing to the numerous and intricate points involved, it would be exceedingly difficult, if not almost improper, to deal with the matter at once, if there had been other persons named who would be directly interested in the property. It is, however, abundantly clear that the only persons who could possibly be interested on any construction of the will are the mother and the heirs-at-law of the father. The heir-at-law of the father would *prima facie* be the boy himself, and therefore any other persons interested under the will are exceedingly remote, if there are any at all. Under these circumstances I shall deal with the matter at once. The personal property is more or less contingent. Under the Trustee Act the trustees of the will have power to allow the infant maintenance, and I shall therefore take that into consideration in dealing with the question now. But there is a bequest of real estate to the father for life, afterwards to the son in fee-simple, to be divested in case of his death. There is a power under the will authorizing the trustees to receive rent and accumulate. But that in no way affects the bequests to the boy. Then, if it did, it would still be competent for the trustees under the Trustee Act to make some allowance for maintenance to the

infant petitioner. Then comes the question of the interest over. I have already shown that these interests are exceedingly remote if any, and the case of *Decrambes* v. *Tomkins*, 1 Cox's, ch. 133, does not touch the point because in that they were contingent gifts. These are absolutely vested gifts to the sons, and not contingent. But if they were contingent the Trustee Act would come into force; and there are grounds for the Court to deal with the property. Then I will deal with the declaration in the will with regard to the accumulation. Undoubtedly it is clear and precise, and if there were other children interested in the matter, I very much doubt if the Court could deal with it. The cases of *Stretch* v. *Watkins*, 1 Mad., 253, and *Greenwell* v. *Greenwell*, 5 Ves. 194, show that, in many instances, notwithstanding an express declaration for accumulation, the Court has ordered some payment for the maintenance of the infant. I think I ought to follow those cases, more especially as there are no others interested. As to the amount of maintenance asked for, I have had the benefit of a conference with the Master, and he agrees that £300 a year would be too much, especially in the face of the power for accumulation I think it would be sufficient to allow £50 a year for education, £30 for clothing, and £30 for contingencies, the amount for medical attendance, as the boy is in delicate health, to be approved of by the Master; payments to be made half-yearly in advance, and the payment of the £87, already expended by the mother, forthwith out of the funds in hand, if any; the costs of all parties to come out of the estate.

Order accordingly.

19 AND 20 DECEMBER, 1881.

HARVEY v. THE ADELAIDE AND HINDMARSH TRAMWAY COMPANY, LIMITED.

COMPANIES ACT, 1864.—*"Proposed extensions"—Sufficiency of notice—Resolution—Shareholder—Acquiescence.*

The Directors of a Company registered under the Companies Act, 1864, *convened a meeting of the Company for the purpose of considering "proposed extensions," and at such meeting a resolution was passed, "That the proposed extension of the Company's tramway, as explained by the Chairman, be, and is, hereby approved." At the meeting new lines, other than those intended by the resolution, were discussed, and referred to as "proposed extensions."*

The plaintiff, a shareholder, was present at the above meeting, but protested against the proposed action on the ground, amongst others, of the insufficiency of the notice.

On action for an injunction to restrain the Company and its Directors from expending money of the Company in extensions, pursuant to the above resolution—

Held—*That the resolution was bad and insufficient, and the plaintiff was entitled to the injunction sought.*

Quære—*Whether the plaintiff, having attended the meeting, was not estopped from setting up the insufficiency of the notice of the objects for which the same was convened.*

THIS was an action for an injunction to restrain the defendant Company and its Directors from applying the capital, represented by 5,000 shares authorized in 1878, to any other purpose than that of the construction of lines from O'Connell Street, North Adelaide, to Hindmarsh and the Grange, for which an Act had been obtained in 1877.

The facts sufficiently appear from the head-note and judgments.

Symon, Q.C., and *C. C. Kingston* for the plaintiff; *Mann, Q.C.*, and *Gall* for the defendants.

BOUCAUT, J.—This is a suit brought by Mr. Harvey, a shareholder in the defendant Company, for an injunction to restrain the

Directors from expending a portion of their capital in the construction of a tramway to Henley Beach. *Mr. Symon's* case was shaped in two ways—(1) A want of *bona fides* on the part of the Directors in appropriating money devoted to one purpose to another, and (2) That the resolution was technically bad. By consent of the learned counsel on both sides I am not called upon to give any judgment on the first branch of the argument. I think it only just to the defendants that I should emphasize that *Mr. Symon* has disclaimed making any charge against them of actual moral turpitude, and has simply raised a question as to breach of trust. And that makes it less unsatisfactory to me when called upon by the parties to decide the question on the other point—the validity of the resolution. I have heard a very able argument, and have taken a view, which I indicated, against the validity of the resolution. And it is right that I should say that I am not so clear as I have been about it, because I have been pressed by the very close and subtle argument of *Mr. Mann*, but if I were to take time to consider it I do not think I should come to any other conclusion, because the consequences of upholding such a vague and indefinite resolution would be very serious. Therefore, considering that, I shall deal with the subject, so as to show *Mr. Mann* my reasons for thinking the resolution bad. First of all, as to the argument of the resolution being sufficient in itself when read over: it palpably refers to something said by the Chairman. "The proposed extensions, as explained by the Chairman," is vague, and undoubtedly, in this case, open to ambiguity. It is not so clear that it would necessarily convey to every shareholder's mind that it referred to this particular line to Henley Beach, and not to the lines to New Thebarton and the Grange, which were spoken of at the same time, and had been spoken of as extensions. While not regarding this ambiguity as conclusive of the matter, I have founded my judgment on this point—that this resolution is vague, because companies, under such a resolution, could over-ride majorities and imperil a man's interests in a large degree, contrary to the spirit of their articles and contrary to the spirit of the Companies Act. The 66th Section of the Companies Act is larger and more restrictive to the Company than the words in the Articles of Association in the present case,

which simply say, "The Directors shall cause minutes to be made," whereas the Act says, "Every Company under this Act shall cause minutes of all resolutions and proceedings and general meetings of Directors or Managers to be duly entered in books kept for the purpose." I cannot say, and I should require some strong arguments to convince me, that any Judge should say that a resolution setting forth that "the proposed extension, as explained by the Chairman, should be, and is, hereby approved" was duly entered in the book as a proceeding of that meeting. Holding the resolution to be bad on that ground, it is not necessary to go into the question of sufficiency of notice. *Mr. Mann's* argument with regard to Mr. Harvey attending a meeting of the shareholders would point more strongly against him as a waiver of notice than as a waiver of any irregularities in the resolution, but on that, although I am influenced by the argument, I think it would be very hard on Mr. Harvey, who attended the meeting and objected to and protested against the proceedings, to say that this amounted to a waiver. But I express no definite opinion on that point, as I hold that the resolution itself is bad. Then *Mr. Mann* argued that Mr. Harvey was estopped from objecting to what was done at this meeting. I have doubts as to whether he is not estopped as to the notice, but I do not think he is as to the resolution. Before I can say he is estopped it must appear that he has done something showing an actual acquiescence —something leading the Directors to take a different status from that which they would otherwise have done, and showing that he knew precisely what was being done. Well, it has been shown that he acted under protest. *Mr. Mann* argues that the resolution must refer to this line, because the Company could not carry it out without an Act. *Mr. Symon*, however, has pointed out that there were two other lines which Mr. Harvey supported—those to New Thebarton and the Grange—which were spoken of as "proposed extensions." And that being the case, I will not, on the authority of the case cited, extend against Mr. Harvey strictly the suggestion that his attending the meeting has estopped him from objecting to both the notice and the resolution. Although the case referred to shows that a man cannot attend and fight and take the benefit of fighting at the meeting, and afterwards lie by

for some months and then stir the matter up again, it does not decide the point here involved. There was no lying-by in the proceedings; in this case there was a fight all along. And, therefore, there is a manifest distinction between the case cited and the particular circumstances under which Mr. Harvey attended and protested. Then as to the subsequent meeting *Mr. Mann* has referred to, I have already expressed my opinion during the argument that I cannot uphold or support the resolution set out in the pleadings when it is bad. I am dealing with the case on the strict legal right of Mr. Harvey. He is certainly not entitled to any extraordinary equitable intervention. He is a shareholder of the Company having a most limited and paltry interest, and he is availing himself of his right to enforce his claim against the Company by reason of the defect of his notice—a position which he has a right to adopt, but in which the Court will not go out of its way to assist him. It was admitted during the argument that Mr. Harvey's main interest is in the Grange rather than in this Company. I mention this because I feel that I am not entitled to give any particular equitable consideration to him. Then I wish to point out that the Company is in no better position, because I think it is the duty of a Court of Equity to see that these Companies act with some reasonable reference to their Articles of Association and Act of Parliament. I do not wish to be severe on the gentleman who drew up the resolution, but men must know, where immense interests are at stake, where hundreds of families are often ruined by practices of companies, that they must have minutes and resolutions kept in such a manner that they can be referred to by those persons who oppose them in anything done under them. Nothing of the sort was done here, and I cannot do otherwise than say that any strict technical right Mr. Harvey sought to avail himself of, the defendants have brought upon themselves by their gross negligence. Companies have no right to treat their shareholders in the way this Company has done. If this resolution had been drawn by a clerk who had had twelve months' training in Company law, I should say the sooner he left it and went to the awl or the anvil the better. It is not endurable that this state of things should be allowed. On the strict technical ground Mr. Harvey is entitled to an injunction to

restrain the Company from acting under the resolution and constructing a line to Henley Beach. The form of the injunction will be :—That the defendants be restrained from applying any portion of the funds and capital of the Company, represented by shares 5,000 to 10,000, in the construction or maintenance of, or towards providing plant or material for the said line to Henley Beach, by way of or beyond New Thebarton, until and unless such extension to Henley Beach or beyond New Thebarton has been duly authorized by the holders of the original shares from 1 to 5,000.

Injunction accordingly.

WAY, C.J., BOUCAUT, J., ANDREWS, J.] [COMMON LAW.

27 JUNE, 1881, AND 22 DECEMBER, 1881.

MAIR v. BOOTHBY.

DEMURRER—Holding over till hearing—Illegal agreement—Rights of parties inter se—Company—Promoters.

To an action for remuneration for assisting at defendant's request to float a certain Company the defendant pleaded that the plaintiff was, with others, one of the promoters of the Company, and as such received a sum of £105 from the Company as a remuneration for his services; that, at the time of the making of the agreement sued on, the plaintiff was such promoter and the defendant engineer of the proposed Company; and that the last-mentioned agreement was made without the knowledge of plaintiff's fellow-promoters or of the shareholders. Demurrer to above plea ordered to stand over till hearing to enable facts to be more precisely ascertained.

Quære—*Whether the above agreement was illegal, and if so, whether the defendant could avail himself of such illegality as a defence to the action.*

DEMURRER to defendant's plea.

The claim stated:—The plaintiff's claim is for remuneration for services rendered by plaintiff at defendant's request in assisting in the floating and carrying out of the Glenelg and South Coast Tramway Company, Limited. The remuneration was agreed at one-fifth of all commission received by the defendant. The plaintiff also claims interest at the rate of £10 per centum per annum on such agreed remuneration from the date of receipt of the commission by the defendant. The defendant received a commission between June 28, 1878, and October 4, 1879, commission amounting to £900, of which the plaintiff's share of such one-fifth amounted to £180. The interest due to date is £37 2s. 1d., making a total claim of £217 2s. 1d. The plaintiff also claims interest on the said sum of £180 from date hereof till payment or judgment.

The defence was—1. The defendant denies that the plaintiff ever rendered him any service in assisting in the floating and carrying out of the Glenelg and South Coast Tramway Company, Limited,

as alleged by the plaintiff in his statement of claim. 2. The defendant says that the plaintiff was one of the original promoters of the Glenelg and Brighton Tramway Company, and that the plaintiff, with A. Campbell, M.D., W. G. Chinner, J. Counsell, G. R. Debney, J. Downing, J. Hodgkiss, C. Holland, T. King, Sir G. S. Kingston, W. Reynell, W. Townsend, and S. R. Wakefield, as promoters of the Company, in May, 1877, issued a prospectus of the said Company, and in pursuance of such prospectus numerous persons in South Australia applied for shares, and had the same allotted to them by the plaintiff and his co-promoters and became shareholders in the said Company. 3. The defendant says that in the said prospectus the plaintiff is described as one of the promoters and the defendant is described as one of the engineers of the Company. 4. The defendant says that the contract or agreement between the plaintiff and himself, and under which the plaintiff now sues, was contained in the following letter:— "Wallaroo Mines Office, Adelaide, August 7, 1877. W. Mair, Esq., Adelaide.—Dear Sir—As arranged between us, I hereby undertake and promise to pay to you for your services in assisting me to float and carry out the Glenelg and Brighton Tramway Company one-fifth of all commissions from bonuses I may receive from the promoters or Directors of the Company for constructing the line of tramway, plant, &c.—Yours faithfully, B. Boothby." 5. The defendant says that the services, if any, performed by the plaintiff in assisting and floating the said Company were performed by him in his capacity of promoter of the said Company, and not otherwise. The defendant further alleges that the plaintiff received from and was paid by the Directors of the said Company, as soon as it was formed, the sum of £105 for his services in assisting to float the said Company. 6. At the time when the plaintiff and the defendant entered into the agreement contained in the fourth paragraph, the plaintiff was a promoter of the said Company and the defendant was the engineer of it, and the defendant alleges that such agreement was never disclosed to the other promoters of the said Company, or to the allottees of the shares or shareholders who subscribed for and took shares in the said Company, but the same was wrongfully concealed and kept secret from them by the plaintiff. The defendant further alleges that

the Directors who appointed him to the position of engineer to the said Company so soon as it was formed were the said Dr. Campbell, J. Counsell, J. Hodgkiss, Sir G. S. Kingston, and T. King, who were co-promoters with the plaintiff in issuing the original prospectus; and the defendant charges that the plaintiff never informed them of the said agreement, neither while they were promoters nor upon their being subsequently appointed Directors, and the defendant submits that the said contract is invalid and illegal, and the plaintiff cannot enforce it against him.

To this defence the following demurrer was entered on May 8:—The plaintiff demurs to so much of the defence as sets up that the contract is an invalid and illegal one, and says that the same is bad in law, on the ground that the facts alleged disclose no invalidity or illegality disentitling the plaintiff to recover.

W. J. Belt in support of the plea. First, the plaintiff was one of the promoters, and occupied a fiduciary relationship; secondly, while he was in that relationship he entered into the agreement by which he was to receive 20 per cent. of the defendant's salary as engineer; thirdly, he wrongfully kept this agreement secret from his co-promoters and allottees of shares.

Bagnall v. *Carlton*, 47 L.J., Ch. 31
Harrington v. *The Victoria Graving Dock Company*, 3 L.R., Q.B., 549.

The Company should be a party to the suit, and the Court will not uphold an illegal agreement like this. If a lump sum were to be paid, the position would have been very different; but the defendant's salary and commission were altogether unfixed.

Thompson v. *Blackstone*, 6 Beav., 470
Rede v. *Oakes*, 13 W.R., 303.

Symon, Q.C., in support of the demurrer. According to the agreement the sum is as fixed as if it were a lump amount. Before it was entered into, this remuneration depended upon what the defendant was to receive—depended upon his services as engineer,

with which the plaintiff had nothing to do. The agreement may be voidable, but it is not void at the instance of the defendant. The defence cannot be raised that the money is not the plaintiff's, but the Company's, because it is not a technical objection to the agreement, but affects its substance. If the contract is illegal, the Company could not be a party to the action. If the Company can recover, the contract is good. [BOUCAUT, J.—Not necessarily, as they might recover the money on the ground that it was money received to their use.] To recover the money they must affirm the contract. [BOUCAUT, J.—They might repudiate it altogether, according to the cases cited.] It was not necessary to make the Company a party to the agreement. If it is legal the plaintiff is entitled to the money just as if he were a trustee of the Company. The cases cited only establish a well-known and generally admitted doctrine of law: that persons holding certain relations cannot buy or sell offices. They do not apply to the plaintiff, who was engaged to assist in carrying out the Company—in other words, to discharge his duties as promoter with greater zeal, and that under the circumstances was not illegal. The position of the parties may be described in the following manner:—If this agreement is legal the plaintiff is certainly entitled to recover from the defendant, and the Company may or may not be entitled to recover from the plaintiff. The agreement may be illegal, *malum in se*, or *malum simpliciter*; but it is incumbent on the other side to show one or the other. The right of an agent to make money out of his principal depends on the validity of the contract. The cases referred to as dealing with trusts are not to the point, because they only show that the Court of Equity will not place itself in the position of having to enforce a breach of trust which does not exist in the present case.

Gover's case, 1 Ch. D., 182.

If the agreement was not illegal in its inception, no subsequent non-disclosure to the Directors could make it illegal.

W. J. Belt in reply.

Cur. adv. vult.

22 December, 1881—

WAY, C.J., now delivered judgment herein as follows:—This was an action to recover £180, and interest, being 20 per cent. of the commission received by the defendant as engineer of the Glenelg and South Coast Railway, which the defendant agreed to pay to the plaintiff for his services in floating the Company. The defendant, by his plea, says that the agreement between the plaintiff and himself was to be kept secret from the Company and the plaintiff's fellow-promoters, and the plaintiff has been paid by the Company for his services, and under these circumstances the alleged agreement is fraudulent. The plaintiff demurred to this plea as being no answer to the action.

If this agreement had been between strangers to the Company it would have been an innocent and valid agreement. Is it altered by the plaintiff being a promoter, and the defendant the engineer of the Company? It has been decided by the Common Law and Equity Courts in England, not merely by the three Divisional Courts, but also by the Court of Appeal and the House of Lords itself, in a series of decisions, of which the *New Sombrero Phosphate Company* v. *Erlanger* (5 Ch., Div. 73, 3 App. Cas. 1218) is one of the leading cases, that a promoter of a company stands in a fiduciary position towards the company which he is seeking to promote, and a secret agreement, under which he is to have an advantage not disclosed to the Company, would be a fraudulent agreement, as against the Company. But these cases have not decided that such an agreement would be void, as between the parties to it and other persons than the Company. In the case of *Harrington* v. *Victoria Graving Dock Company* (3 Q.B.D. 549), it was decided that a contract, which was, in effect, a bribe to an officer of the Company to act inconsistently with his duty, though his mind was not biassed, and he had performed the contract he had entered into, could not be enforced by him, and was void.

But, in this case, the contract was to do something not inconsistent with the plaintiff's duties to the Company; it was to float or start it. It was, therefore, not a contract to do anything wrong.

The plea states that the services which the plaintiff rendered were as promoter, and that he was paid by the Company £105 in respect of them.

It does not appear on any part of the pleadings that there was, or was not, an agreement between the plaintiff and his fellow-promoters to assist in floating the Company, or, if there was such an agreement, whether it was entered into before, or contemporaneously with, or after the agreement with the defendant.

Upon these facts and this state of the pleadings a number of extremely difficult questions arise. First, whether there was, or was not, an agreement between plaintiff and the Company, was it the duty of the plaintiff to communicate to the Company that the services they were paying £105 for were paid for by some one else? Secondly, was there, or was there not, a duty on the part of the plaintiff to inform his fellow-promoters of the Company that he was to receive part of the defendant's commission in order to prevent the Company from paying too much for the services they were receiving from their engineer—that is, they were to pay him 20 per cent. more than the net amount he was actually to receive in respect of them?

Another question is—If one of the promoters could secretly receive 20 per cent. of the engineer's commission, why could not five promoters enter into a similar arrangement, and thus receive the whole of the commission, and, with that state of facts, what kind of services could the Company expect to receive, if its servant was to receive no remuneration at all in respect of the services which he rendered, but it was to go into the pockets of the promoters?

Another question which arises is—If there was an agreement between the Company and the plaintiff to pay him in respect of his services before his agreement with the defendant to keep one-fifth of his commission, what consideration was there for the defendant's promise?

Another question is—If the plaintiff's agreement with the

Company was concurrently with, or after, the agreement with the defendant, would it, or would it not, be a fraud upon the Company to procure a promise to pay, or payment for, services which the plaintiff was already bound to perform, and for which he would be paid by the defendant? Was it a breach of the plaintiff's fiduciary position as promoter to accept an obligation to pay, and afterwards payment from the Company for services for which he was afterwards to be paid by the defendant?

The law as to the rights of persons in the position of the plaintiff and defendant *inter se* has not been, so far as the Court has been able to ascertain, with the assistance of the Bar, and from their own researches, finally settled. It is laid down in the notes to *Collins* v. *Blantern* (1 Smith's L.C., 7th edition, 398), "It seems that a contract is not illegal or void, simply because private rights are interfered with by the act stipulated for, *e.g.*, where the consideration is a breach of contract or of private trust, the contract may be enforced, and the persons injured by its performance are left to the ordinary means of redress." That is also laid down in the original edition of Smith's Leading Cases, and there do not appear to be any other authorities added by the subsequent editors of that valuable work. But there are *dicta* in support of the proposition thus laid down in the passage I have cited in the case of *Shaw* v. *Jeffery* (13 Moo. P.C.C. 432). But the position laid down in the notes to *Collins* v. *Blantern* is disputed in that very valuable and much more scientific work than most legal text books, "Pollock's Principles of the Law of Contracts." At page 223, this proposition is put—"Again, an agreement will be illegal, though the matter of it may not be an indictable offence, if it contemplates any civil injury to third persons. Thus an agreement to divide the profits of a fraudulent scheme, or to carry out some object, in itself not unlawful, by means of a trespass, breach of contract, or breach of trust, is unlawful and void. It is submitted that this must be taken as established, notwithstanding a doubt expressed in a work of no small authority." (That is the passage in Smith's Leading Cases which I have quoted.) In support of that proposition Mr. Pollock cites a case which was not cited in the argument before the Court,

to which my learned colleague, Mr. Justice BOUCAUT, called my attention before we entered into an investigation of the case with the assistance of the text-books. That is the case of *Jackson* v. *Duchaire* (3 T.R., 551). That case is well summarized by Mr. Pollock as follows:—"A applies to his friend B to advance him the price of certain goods, which he wants to buy of C. B treats with C for the sale, and pays a sum agreed upon between them as the price. It is secretly agreed between A and C that A shall pay a further sum; this last agreement is void as a fraud upon B, whose intention was to relieve A of paying any part of the price."

The point in this case is one of extreme difficulty. It is one that has occupied the Court's most anxious attention, and upon which they have not arrived at a unanimous conclusion. It is a question the final determination of which requires, that the facts should be carefully and precisely ascertained. The facts in the case are not admitted and the pleadings are ambiguous in their character, and the Court think it is more consistent with the administration of justice, which is not a trial of skill between the pleaders on opposite sides, but is for the purpose of ascertaining what is the final right between the parties, that, rather than a judgment should be given which would not be a unanimous one, upon a record which is confessedly imperfect, and deals with facts which are not admitted, they should adopt the precedent which has been established in several recent cases in England, of holding over the demurrer until the hearing. The facts, then, will be ascertained, and the Court will be able to do complete justice between the parties upon the actual controversy, rather than upon an hypothetical one. And, in further support of the course they intend to adopt in this case, it may be pointed out that the defendant has no right to come to Court seeking for any advantage for himself. To put it mildly, his position is, at least, open to criticism in having entered into a contract, accepted the performance of it on the part of the plaintiff, and then, when invited to pay the consideration, turned round and said it was fraudulent. On the other hand, with respect to the plaintiff, I trust he will be able to deny, or, at least, to explain, the position in which it is alleged he is placed, of entering into an agreement which he kept secret from his fellow-promoters, and

under which he was to receive payment for services for which they were paying him, and under which, it is alleged, he was also to receive, and receive without the knowledge of his fellow-promoters, one-fifth of the remuneration which they were to pay to an officer of the Company of which he was a promoter. As I have said, therefore, the decision of the Court is that the demurrer be held over until the hearing.

Demurrer held over until hearing.

22 DECEMBER, 1881.

IN THE MATTER OF THE HALLETT AND TEROWIE RAILWAY, AND OF THE CLAIMS OF JOHN WARWICK.

RAILWAY CLAUSES CONSOLIDATION ACT, 1847, *Secs.* 62, 63, 64.—*Compensation—Severance—Accommodation works.*

Claimant's lands consisted of several sections, which the railway intersected. On one side of the railway was permanent water, to and at which Claimant's cattle had previously had free access and usually watered. There was a level crossing, and gates were provided through which cattle could be driven to the water when the gates were open and no train was running.

Claimant had previously claimed, and been awarded compensation for severance from such permanent water under the provisions of the Railway Clauses Consolidation Act, and afterwards took proceedings before Justices to compel the Commissioner of Railways to provide accommodation works to facilitate access to such water. The Commissioner denied that the claimant was entitled to any such accommodation works.

Held—1. *That Claimant's cattle were deprived of access to their usual watering places, within the meaning of Section* 63 *of the Railway Clauses Consolidation Act*, 1847. 2. *That the defendant having claimed, and received compensation by reason of such severance was not entitled to require the Commisssoner to provide such accommodation works as aforesaid.* 3. *That the Justices had no jurisdiction under the circumstances, under Section* 64 *of the above Act, their jurisdiction only arising where it is conceded that accommodation works are necessary, and the dispute is as to the nature and extent of such works.*

SPECIAL case, stated by Justices for the opinion of the Supreme Court.

The facts and arguments sufficiently appear from the judgment.

H. E. Downer and *Hargrave* for the claimant.

C. C. Kingston for the Commissioner of Railways.

22 December, 1881.—

Judgment was now delivered as follows—

WAY, C.J.—This is a claim under Section 63 of the Railway Clauses Consolidation Act, incorporated with the Hallett and Terowie Railway Act. Mr. Warwick made an application before Justices for an order for the construction of certain accommodation works under Section 64 of the Railway Clauses Consolidation Act; and the Justices stated a case for the opinion of this Court, in which three questions were reserved for its decision. The first question was:—"Was it shown that, by reason of the railway, Mr. Warwick's cattle were deprived of access to their former watering-places, within the meaning of Section 63 of the Railway Clauses Consolidation Act?" Under that section it is the duty of the Commissioner to provide "proper watering-places for cattle, where, by reason of the railway, the cattle of any person occupying any lands lying near thereto shall be deprived of access to their former watering-places." Mr. Warwick's estate consisted of several sections cut in two from north to south by the railway, and on the east side of the railway there was a well in which there was permanent water, at which Mr. Warwick's cattle had, before the construction of the railway, been in the habit of watering. But it was contended by the learned counsel for the Commissioner that the cattle were not deprived of their usual watering-places for two reasons:—1. Because there was a level crossing over the line, by means of which, if the gates were open, and if the cattle were mustered, and they were carefully driven at a time when no train was running or expected, they might, by means of this somewhat complex and not very easy operation, be driven to drink at their old watering-places. But it appears to the Court that this section must rather be read from the point of view of a practical man, than of a technical construction which an ingenious lawyer might put upon it. And, therefore, it appears to the Court exceedingly clear that, so far as the well is concerned, the cattle were deprived of access to their usual watering-places. But then, it is said, that the Court should not interpose, and the Justices should not have made an order because there is water at a place called Tommy's Gap. Now, Tommy's Gap is a mile and a-half from this part of plaintiff's estate and is divided from it by a Government road, not fenced it is true, but which may be fenced at any time by the District

Council; and therefore, because of this, it may be cut off at any time by the will of other persons than Mr. Warwick, Under these circumstances the Court has no difficulty in answering the first question in the case stated—that Mr. Warwick's cattle were deprived of access to their usual watering-places.

The second question is—"Was the claimant precluded, under the proviso to the said Section 63, from requiring the Commissioner to supply a watering-place on the west side of the line by reason of the facts before-mentioned?"

Now, the rights of persons whose lands are taken for purposes of a railway are, to be paid first the value of the land taken, and secondly reasonable compensation for the land by reason of the severance; and the Act imposes a duty on the Commissioner of Railways to make reasonable accommodation works, which are divided into four classes—(1) ways, (2) fences, (3) drains, (4) watering-places. And it has been held that if a Jury, in assessing damages by reason of the severance, do not, in making their calculations, assume that proper accommodation works will be provided, they act contrary to law. That is laid down in the case of *Reg.* v. *The South Wales Railway Company* 13 Q.B., 988. In *Skerratt* v. *North Staffordshire Railway Company*, 5 Railway Cases, 166, it was held that, if the nature of the accommodation works to be granted were included in the submission, the arbitrator is still not bound to enter into the consideration of what these accommodation works should be, but is justified in making his award, confining it to the two elements, first, the value of the land; secondly, compensation for severance, and without deciding the nature of the accommodation works which ought to be provided.

Although that is the law, it is clearly competent for both parties—the authority constructing the railway and the landowner whose property is taken—to enter into an agreement under which the Commissioner shall agree to pay and the landowner to receive compensation, on the assumption that these accommodation works are to be waived by the landowner and not to be made

by the Commissioner, and if that were done, and compensation awarded and paid on that assumption, that would amount in law to an agreement. That is what happened here. There was a notice of claim sent in, in which Mr. Warwick claimed compensation by reason of severance of the land taken from other land belonging to him and from the use of the permanent and other waters therein. Then the award was made by the umpire, the arbitrators having disagreed, for compensation by reason of the premises. If the case rested there, it appears to us the presumption would be that the arbitrator had, as he was entitled to do, not taken into account the failure on the part of the Commissioner to erect proper accommodation works, and it would have been competent for Mr. Warwick to obtain, either by order of this Court or of the Justices, an order for the construction of proper accommodation works. But the case goes farther than that. It says:—"It was proved that the case for the claimant, on the hearing of the claim which resulted in the award, was, that the water from the well and water-course would be entirely cut off from the west side, and that the damages were assessed, paid, and received accordingly." So that the plaintiff, by an executed agreement, has been paid by the Commissioner for the deprivation of the accommodation works he now seeks to have constructed. To use a colloquial expression, he has eaten his cake, and a substantial cake it was, for the compensation amounted to £1,300 or £1,400, and seeks by these proceedings to have it still. This appears to come under the proviso contained in Section 62 overriding all these clauses as to accommodation works, "That the Company" (that is to say, the Commissioner), "shall not be required to make such accommodation works in such manner as to prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

Under these circumstances it is not necessary to answer the third question. But the Court has been pressed on the part of the Government to answer that question, as being one of great public importance, and where railway extension is taking place on such a

large scale, cases of this kind will be constantly occurring. The question is, "Had the Justices jurisdiction to settle the dispute, the same being as to the liability of the Commissioner to provide any accommodation works whatever in the matter of the said claims?" The decision of that question turns on Section 64, which gives the Justices jurisdiction in the matter, and is as follows:—"That if any difference arise as to the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintenance thereof, the same shall be determined by two Justices, and such Justices shall also appoint the time within which such works shall be commenced and executed by the Company." Singularly enough there is no English case on the construction of that section. The two cases of *Reg.* v. *York and North Midland Railway Company*, 14 L.J., Q.B. 277, and *Hood* v. *North-Eastern Railway Company*, L.R. 11, Eq. 116, cited by *Mr. Downer*, turned on the construction of Statutes passed before the Railway Clauses Consolidation Act, and in which the language adopted in the section in question is not followed, and in which the jurisdiction is clearly given over the whole subject-matter to the Justices. But a construction has been placed in the Irish Courts on the Section of the Irish Railway Clauses Consolidation Act containing the same words as this section. The case of *Reg.* v. *Waterford and Limerick Railway Company*, 2 Ir. C.L.R., N.S. 580, decided that it was not a question for the Justices whether or not a person was entitled to accommodation works, but, it being conceded that accommodation works were required, it was for them to determine what works were to be done. And this Court not merely bows to the decision in that case, but agrees with the reasons by which it was supported. They think the true construction of the section is not to give jurisdiction to Justices where the right to accommodation works is altogether in dispute, but what is given to them is simply a subsidiary duty, where, it being conceded that accommodation works are required, it is for them to decide as to their nature in a summary manner. And the Court thinks that there is good reason why such large jurisdiction as was contended for on the part of Mr. Warwick in this case should not be given. The applicant seeking accommodation works chooses his own tribunal,

and goes before any Justices of the Peace whom he chooses to select. No doubt any gentleman on the Commission of the Peace would go fairly into the matter, but there is also no doubt that any landholder or land proprietor, however anxious to do justice between the public and the applicant, might naturally take a strong view of the rights of the parties with respect to these applications for accommodation works. And it can easily be understood that the Legislature would pause before handing over to Justices without appeal a power which, if exercised, I will not say tyrannically, but in a mistaken manner, might result in an order against which the country and the public would have no remedy whatever, for the execution of works altogether beyond the requirements of the applicant, and the execution of which might render it impossible, in a number of cases, to carry on railway works at a profit or at all. *Mr. Downer* argued that, in this case, jurisdiction had been given because a level crossing had been constructed by the Commissioner, and therefore, he had admitted the necessity for accommodation works. But the case states the Commissioner denied his liability to provide any accommodation works in the matter, and the Court does not think that the granting of the level crossing gave jurisdiction to the Justices, at any time afterwards, to decide that accommodation works of another description from that in respect to which there was no dispute whatever, should be granted.

The answer to the case, therefore, will be as to the first and second questions submitted for consideration in the affirmative, and, as to the third question, in the negative.

Case answered accordingly with costs.

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"Par. 6.—The breakwater shall be built of granite blocks."

"Par. 7.—Mode of construction. The section of the breakwater is divided into seven areas (see Drawing 2.) The minimum weights of blocks to be used for the different areas are as follows :—Area A, twenty-ton blocks; area B, ten-ton blocks; area C, five-ton blocks; area D, three-ton blocks; area E, two-ton blocks; area F, one-ton blocks. The blocks shall be thrown in as close together as possible, and all interstices shall be filled in, as the work proceeds, with small stones. The Superintending Officer shall have power to regulate the quantity of small stones to be put in, and he shall have power to decide whether the contractor has put in a sufficient quantity of the blocks specified for each area. The contractor shall give the Superintending Officer, at any time, any assistance he may require in measuring the blocks before they are put in, or in ascertaining the state of any part of the work, free of expense. The inside slope of the breakwater under low water level shall be formed, as far as practicable, to an inclination of one to one; the outside slope shall be the natural one assumed by the material, or about one in four. The slopes above low-water shall be formed one to one by setting the blocks carefully in place, by means of cranes, &c., to the slope shown upon the drawing."

Amongst the general conditions above referred to were the following :—

"19. The Treasurer reserves the right, from time to time, of requiring, by writing under his hand, the omission of any portion or portions of the work described in the specifications or the drawings . . . . . and, in any such case, the Engineer of Harbours and Jetties shall, by writing under his hand, determine whether any, and, if so, what deductions from the contract price shall be made in respect thereof."

"20. No alterations or deviations whatever will be admitted or recognised under any circumstances, or be allowed or paid for by the Treasurer, unless the same shall have been ordered or directed by the Engineer of Harbours and Jetties, in writing."

"41. None of the clauses or provisions of this specification, or of these conditions, or of any other part of this contract, shall be varied, waived, discharged, or released, or held or deemed so to be at law or in equity, unless in the manner prescribed, or by the express consent of the Treasurer, under his hand."

On the drawings the breakwater was represented as consisting of granite blocks of the various sizes specified, thirty feet wide at the top, having on the inside an uniform slope of one to one, on the outside a slope of one to one from the top to low-water mark, then a horizontal terrace or "berm" twenty feet wide, and lastly a slope of one to four below low water to its termination. This slope was marked "natural slope assumed by the material."

The plaintiff proceeded to construct the breakwater under the superintendence of the Engineer of Harbours and Jetties, and with his consent wholly omitted the "berm," thus making an uniform slope on the outside from top to bottom, and, by using larger blocks than those specified, rendered the slope considerably steeper than one to four. Before the work was finished the Engineer-in-Chief, taking

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the place of the Engineer of Harbours and Jetties, required the plaintiff to construct the breakwater as shown by the plan, and threatened, on his refusal, to take the work out of his hands.

On action brought by the plaintiff to restrain the defendant from so doing—

Held—1. That the plaintiff was bound under his contract to construct the outer portion of the breakwater as shown in the plan—that is to say, with the twenty feet "berm" intervening between the slopes above and below low-water level.

2. That it was not competent for the Engineer of Harbours and Jetties to waive the execution of any portion of the contract, and that, notwithstanding any act of such Engineer, the defendant was entitled to have the contract completed according to the plans and specifications.

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COSTS OF ACTION.—See MAINTENANCE.

CREDITORS.—See ASSIGNMENT FOR BENEFIT OF CREDITORS.

———— (ASSIGNMENT FOR BENEFIT OF).—See INSOLVENT ACT, 1860 (3).

CUSTOMS ACT, 1864.—*Tariff Act, 1876—Duty—Chicory—Chicory-root.*—By the Tariff Act, No. 34 of 1876, a duty of fourpence per pound is imposed on "Chicory, Coffee, roast or ground."

The article commonly known in the trade as chicory is a brown powder, being the chicory-root dried and ground.

The plaintiffs having imported a quantity of green chicory-root, deposited with the defendant, Collector of Customs, pursuant to Sections 136 and 137 of the Customs Act, 1864, the amount of duty claimed by him in respect threeof, being at the rate of fourpence per pound, and sued for such amount, with interest.

Held—That the duty had been properly charged by the defendant.

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DAMAGES.—See NEGLIGENCE.

DEBTS.—See WILL (1).

DEMURRER.—*Holding over till Hearing—Illegal Agreement—Rights of parties inter se—Company—Promoters.*—To an action for remuneration for assisting at defendant's request to float a certain Company the defendant pleaded that the plaintiff was, with others, one of the promoters of the Company, and as such received a sum of £105 from the Company as a remuneration for his services; that, at the time of the making of the agreement sued on, the plaintiff was such promoter and the defendant engineer of the proposed Company; and that the last-mentioned agreement was made without the knowledge of plaintiff's fellow-promoters or of the shareholders. Demurrer to above plea ordered to stand order till hearing to enable facts to be more precisely ascertained.

Quære—Whether the above agreement was illegal, and if so, whether the defendant could avail himself of such illegality as a defence to the action.

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Immediately after the publication of this report J. B. called at the defendant's office, complained of the inaccuracy of the report, and threatened proceedings unless an apology were published, and subsequently instructed her solicitor to write to the same effect.

The defendant thereupon published in his newspaper, in a conspicuous part, the following paragraph :—"Mrs. J. B. has represented to us that the report is inaccurate, and that the antimacassar was returned before the service of the summons. The evidence also set down by the Clerk of the Police Court does not give any inkling of this having been proved, but, from enquiries we have made, we believe that such was the fact. This being so, we willingly give prominence to that view of the matter, for the whole charge seems to have been a paltry one, and was promptly dismissed by Mr. Beddome."

Held—That the last paragraph was no libel, but that there was evidence to go to the Jury, as to whether the report was fair, honest, and substantially, though not absolutely, accurate.

BONNEY V. THOMAS 15

LICENSED VICTUALLERS ACT, 1880. (1).—*Certiorari—Irregularity—Notice of Objection.*—A person who has given no notice of objection to the renewal of a publican's licence cannot be *certiorari* or otherwise avail himself of an irregularity in the consideration of the Licensing Bench, acting under the provisions of the Licensed Victuallers Act, 1880, of the objections of a person who has given such notice.

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——————————————(2).—Sections 38, 39, 40. —*Notice of Objection—Mandamus.*—The Inspector of Public Houses, in due time before the then next annual meeting of the Licensing Bench, delivered to the Clerk of the Bench a notice in writing, in duplicate, of his intention to oppose the granting to A, a licensed victualler, of a renewal of his licence, on the ground that the management of his licensed house had not been satisfactory, in that he had allowed prostitutes to assemble therein; and the Clerk forthwith posted to A one copy of such notice.

The Bench at its meeting heard the Inspector in support of his objection, and at the close of the evidence retired to a private room to consider its decision.

On its return to Court the Bench refused the licence, but gave no reasons for such refusal.

Beyond the testimony of the Clerk as to the posting of the notice, there was no evidence of the delivery of any notice of opposition to A.

Held—That there was no proof of any delivery of notice as required by Sec. 40 of the Licensed Victuallers Act, 1880, and that A was entitled as of course, under the 38th Section of that Act, to a renewal of his licence, and a mandamus issued to the Bench to sit and grant such licence accordingly.

Semble—That the Bench was justified in retiring to a private room to consider its decision; but that, even if notice had been proved to have been duly delivered to A, he would have been entitled

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SLANDER.—*Privilege—Malice.*—Plaintiff, who had previously heen practising medicine in this colony without any legal qualification, in May, 1876, left for England, whence he returned in November, 1877, having, during his absence, obtained his diploma as Licentiate of the Apothecaries' Hall, Dublin, registered himself by virtue thereof as a British medical practitioner; and also obtained the diploma of M.D. of a Philadelphia University not recognized in this colony nor in England.

On his return to this colony plaintiff, relying on the British certificate and the Dublin diploma, applied to the Medical Board to grant him a certificate of registration under the Medical Act, which application the Board at first refused to accede to, but, subsequently, on being threatened with proceedings for a mandamus, granted.

On the 3rd October, 1880, the defendant, a member of the Medical Association, laid before the Association certain charges against the plaintiff, with a view to his expulsion from the Association; and, on the following day, said to G., also a member of the Association, in reference to such charges, "I brought some charges against (plaintiff) as he is not duly qualified, and on these grounds I sought his removal as a member of the Society. He is an impostor, and his diplomas are forgeries. Either the diplomas themselves were forged, or the necessary documents to get himself examined were forgeries. Such men ought not to be allowed to practise, and a stop should be put to it. The degree he has comes from that stinking little Apothecaries' Hall in Dublin." G. then asked defendant how plaintiff managed to pass the Board here, to which defendant replied, "Partly by bounce, and partly through the forgeries not being detected; but the people in Norwood will soon find out what an impostor and scoundrel he is. I can prove from the time he left this colony how long he was in Dublin."

In December, 1880, plaintiff and defendant, being both candidates for the position of medical officers of a certain lodge, a deputation from that lodge waited on defendant with an application signed by plaintiff with the addition M.D., and setting out the terms on which he was prepared to accept the position, and the deputation asked the defendant if he would undertake the duties on the same terms. The defendant, on seeing the application, said of plaintiff, "He has no right to sign himself M.D. He is an impostor." Shortly afterwards the defendant, in answer to enquiries made by another member of the lodge, repeated the same statement.

Held—That the occasions on which the above statements were made were privileged, and that there was in the statements themselves no intrinsic evidence of malice.

DIXON v. BAILY 6

SPECIFICATIONS.—See CONTRACT.

SUFFICIENCY OF NOTICE.—See COMPANIES ACT, 1864 (1).

SUPREME COURT ACT, 1878.—See GARNISHEE ORDER.

SUSPICION.—See INSOLVENT ACT, 1860 (2).

TARIFF ACT, 1876.—See CUSTOMS ACT, 1864.

TITLE.—See LANDS CLAUSES CONSOLIDATION ACT (1) and (2).

W. K. Thomas & Co., Printers Grenfell Street, Adelaide.